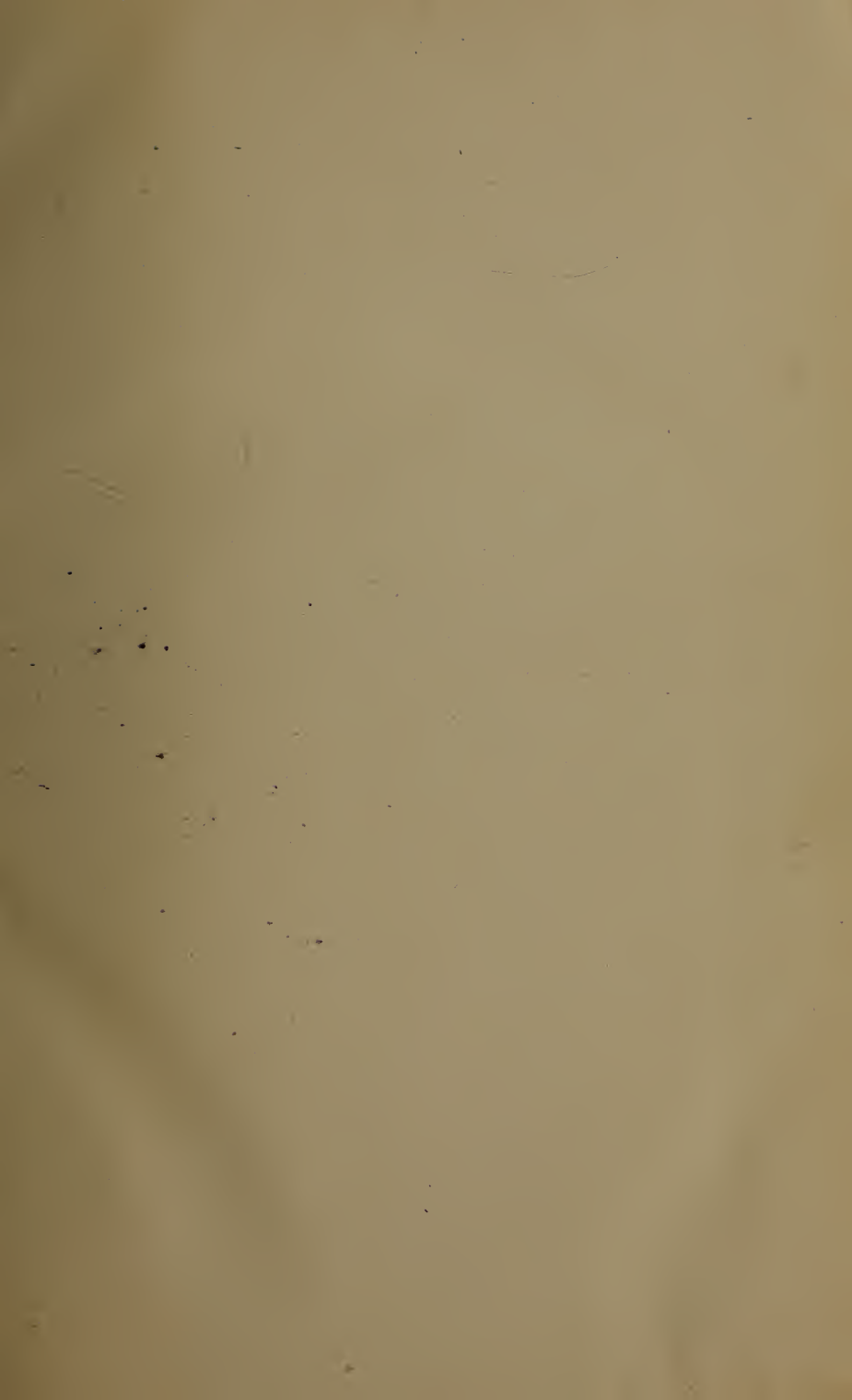




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REPORTS OF CASES
DECIDED IN THE
COURT OF APPEAL,
DURING THE YEAR 1899.



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JUDGES
OF THE
COURT OF APPEAL

DURING THE PERIOD OF THESE REPORTS.

THE HON. SIR GEORGE WILLIAM BURTON, C. J. O.

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ERRATA.

Page 156, line 17, for "1893" read "1895."

Page 545, line 13, for "plaintiff" read "defendant."

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ONTARIO APPEAL REPORTS.

LEIZERT V. TOWNSHIP OF MATILDA.

Municipal Corporations—Damages—Non-repair of Highway—Notice of Accident—55 Vict. ch. 42, sec. 531, sub-sec. 1 (O.)—57 Vict. ch. 50, sec. 13 (O.)—59 Vict. ch. 51, sec. 20 (O.).

The notice in writing of the accident and the cause thereof, referred to in the Consolidated Municipal Act, 1892, sec. 531, sub-sec. 1, as amended by 57 Vict. ch. 50, sec. 13 (O.), and 59 Vict. ch. 51, sec. 20 (O.), is not necessary when the accident is the result of non-repair of a highway which two or more municipalities are jointly liable to keep in repair.

Judgment of a Divisional Court, 29 O. R. 98, affirmed, MACLENNAN, J.A., dissenting.

THIS was an appeal by the defendants from the judgment Statement. of a Divisional Court [ARMOUR, C.J., and FALCONBRIDGE, J.], reported 29 O. R. 98, and was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 21st of September, 1898. The facts and arguments are given in the report below.

Adam Johnston, for the appellants.

Irwin Hilliard, for the respondent.

January 24th, 1899. BURTON, C.J.O. :—

It is clear I think that under the original Municipal Act of 1849, and in the consolidation of 1859, the liability of the corporation for injuries caused by the default of the corporation to keep the highway in repair did not extend to counties, but applied only to public roads and highways which were vested in a city, township, town or incorporated village, and the only limitation imposed was that the action had to be commenced within three months.

Judgment.

BURTON,
C.J.O.

It has never been questioned in this Province, with one exception only, I believe (although a different rule prevailed for many years in at least one other Province) that the transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere nonfeasance, and the only remedy at common law in reference to the public bodies charged with such duty was by indictment for a breach of such duty, but there was no liability to an action for damages at the suit of an individual who had suffered an injury from their failure to keep the road in repair.

After a time jurisdiction was given to counties over certain roads and bridges, and in 1873 a change was made in the clause as to repairs—making the liability extend to all roads—not all such roads as were mentioned in the former statute.

The only condition was that I have referred to until 1894, when by 57 Vict. ch. 50, sec. 13 (O.), the amendment was made as to injuries resulting to persons falling owing to snow or ice upon sidewalks where the corporation was only to be liable in cases of gross negligence, whatever that may mean.

The same Act for the first time required notice to be given, and I was for some time under the impression that it was only in these particular actions that the notice was required, and I was at a loss to understand how the Courts came to decide that the thirty days' notice was required in all actions until my notice was drawn to the change made in the form of the enactment by dropping the section and substituting the separate clauses, as constituting together the section. These which, previously to the change, were very properly described as sub-sections, can no longer be properly described in that way, and the reference to the clause 1 as sub-section 1 caused the difficulty in my mind in understanding the decision.

This was further amended in 1896, by 59 Vict. ch. 51, sec. 20 (O.), by confining the thirty days' notice to actions against a township, and requiring notice to be given

within seven days when the action is against a city, town or village.

Judgment.

BURTON,
C.J.O.

The language of section 13 is perhaps large enough to include all municipalities, but I think that was scarcely in the mind or view of the Legislature when we find them providing for service of the notice on the mayor, that is, the head of a city, and reeve, that is, the head of a township; it is true it provides for service on other head or the clerk, and makes no reference to the warden, the head of the superior municipality.

It may I think well be questioned according to Lord Coke's commentary on the words of the Statute of Westminster II., ch. 41 (2 Inst., p. 457), whether counties were intended to be included. "Seeing," he said, "this Act beginneth with abbots, etc., and concludeth with other religious houses, bishops are not comprehended within this Act, for they are superior to abbots, etc., and these words (other religious houses) shall extend to houses inferior to them that were mentioned before."

There is reason for inferring that it was still the intention to confine this section requiring notice to townships and to cities, towns and incorporated villages. But whatever may have been the proper construction of that section if it had remained in that form, we find an amendment made in 1896, which provided that the thirty days' notice should be confined to actions against a township, and in the case of cities, towns, and incorporated villages the notice should be given within seven days, and no notice at all was required where the action was against a county.

I think we ought to read the words of the Act in their plain grammatical meaning as confined to actions against a township alone or against a city, town or village alone. When then we find that when two or more municipalities are jointly liable for keeping certain roads in repair, and in such cases that a joint action must be brought against all of them, and no express provision is made for notice in such a case, I feel too much doubt to feel that I should be warranted in interfering with the judgment of the

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Divisional Court. It is not an action against a township or against a village—it is a joint action, the creature of the statute, and I fear in so deciding we should be legislating rather than interpreting; it may have been a deliberate intention on the part of the Legislature to confine the notice strictly within the limits specified, or it may be *casus omissus*. That may be unfortunate but our duty is to interpret the language of the Legislature as we find it and not contrary to the words employed to use it to cover a case which the Legislature has not provided for or has overlooked.

I am of opinion, therefore, that the judgment of the Divisional Court should be affirmed.

OSLER, J.A.:—

The Revised Statutes of Ontario of 1897 had not been brought into force when the judgment which is the subject of the present appeal was delivered, and the legislation actually construed by that judgment and in force on the 5th of May, 1897, when the accident happened, was sec. 531 of the Consolidated Municipal Act of 1892, 55 Vict. ch. 42 (O.), sub-secs. (1) and (7), and the amendments of the former made by 57 Vict. ch. 50, sec. 13 (O.), and 59 Vict. ch. 51, sec. 20 (O.).

All these enactments are now found in secs. 606 and 610 of the Revised Act of 1897, ch. 223, with an unimportant change in their arrangement; and, for the sake of convenience, I shall refer to them as they there appear. Their construction is not altogether free from difficulty, as was shewn by the excellent arguments of Mr. Hilliard and Mr. Johnston on behalf of their respective clients, but I am clearly of opinion that the view of the Divisional Court, as expressed by Armour, C.J., is to be preferred to that of the learned trial Judge, and that notice in writing of the accident and the cause thereof is not necessary where the action therefor is required to be a joint action against two or more municipalities. I do not, of

course, include the case of an action against a union of townships, which forms but a single corporation. Judgment.

The first sub-section of section 606 gives an action to anyone who sustains damage by reason of the default of a municipal corporation to keep in repair any road the duty of keeping which in repair is by law cast upon it, and limits the period within which in all cases the action must be brought.

Standing alone, this enactment would entitle a plaintiff, as it formerly did, to sue both or either of two municipalities whose duty it was to keep a road in repair, at his option: *Maw v. Townships of King and Albion* (1883), 8 A. R. 248; *Township of Sombra v. Township of Moore* (1892), 19 A. R. 144; *Balzer v. Gosfield and Essex* (1889), 17 O. R. 700; *Harrold v. Simcoe and Ontario* (1867), 18 C. P. 9.

Section 610 now, however, enacts that where two or more municipalities "are jointly liable for the keeping in repair," any action brought by any person injured by reason of their default, shall be brought against all of such municipalities. Therefore, in any case within these two clauses the plaintiff would fail altogether if he sued one of them alone. The statute makes his cause of action a joint one, since it can be enforced only by means of a joint action against all of the tortfeasors. In the present case such a cause of action has arisen against the two defendant corporations, and the plaintiff has accordingly sued them, as he was bound to do, in a joint action. Notice of the accident was given to the defendant township, but not to the defendant the village of Iroquois, and each of them now contends that by reason of the alleged omission both are discharged from liability.

In support of this contention, they rely upon sub-sec. (3) of sec. 606, a clause which, with all deference to those from whom I have the misfortune to differ, does not bear the construction sought to be placed upon it.

It enacts that no action shall be brought to enforce a claim for damages under this section, unless notice in

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writing of the accident and the cause thereof has been served in the prescribed manner—not in all cases, but—within thirty days after the happening thereof, when the action, *i.e.*, the action intended to be brought, is against a township, and within seven days when the action is against a city, town or village.

It is easy to say that there was nothing to hinder the plaintiff from giving a notice to each of the defendants, and thus to have obviated all difficulty, but the question is whether in such a case as this he was obliged to give any notice at all.

Section 606 (1) is the clause which gives the right of action generally for damages resulting from non-repair, and section 610 shews that under the circumstances of the present case it must be enforced as a joint action against all the corporations concerned.

In such a case does sub-section 3 of the former section apply? I think not. It provides for two cases only, neither of which is the case before us: 1st, when the action is against a township; and 2nd, when the action is against a city, town or village; and prescribes a different period in respect of each within which the notice must be given, at the expiration of which time the plaintiff is or ought to be in a position to commence his action. A third case is where the action is a joint one against two municipalities, and for that, though the action lies by force of sections 606 (1) and 610, no notice is prescribed by section 606 (3). We have no more right to say that two notices shall be given in a case where the statute has said nothing about notice, than we have to say that it shall be given in the case of a county municipality where it is equally silent.

The manner in which the original section has been amended from time to time lends force to this construction. Had it first been passed in its present shape, I doubt if it would have occurred to anyone that the Legislature intended to impose the obligation of giving notice in such a case as this, and we are not now at liberty to

construe it otherwise merely because it has arrived at its present shape by the process of amendment.

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OSLER,
J. A.

Until the passage of the Municipal Amendment Act of 1894, 57 Vict. ch. 50, sec. 13 (O.), notice was not required to be given in any case. That Act provided that no action should be brought "under this section," *i.e.*, section 531, unless notice had been served upon the prescribed officer "within thirty days after the happening of the accident;" thus making notice necessary in every case of any action, joint or several, against any municipality, counties as well as others being included.

Two years afterwards came the amendment of 1896, 59 Vict. ch. 51, sec. 20 (O.), by which the clause I have last placed within quotation marks was continued thus, "when the action is against a township, and within seven days when the action is against a city, town or village." The effect of this change or addition to the clause clearly is to make notice no longer essential when an action is intended to be brought against a county, and as clearly also to limit it to the two cases already specified—one, *viz.*, when the action is against a township, and the other when it is against a city, town or village.

These are two perfectly distinct cases, and we can only hold the present case to be within them by saying what, with all deference, would be inaccurate in fact and in law, that a joint action against two municipalities is the same thing as a separate action, or an action against each of them. It can only be properly described as a joint action, and in respect of such an action I find no warrant in the Act for holding that notice is required. I must adhere to the opinion I indicated on the argument, and vote for the dismissal of the appeal.

Moss, J. A. :—

The accident in respect of which this action was brought happened on the 5th of May, 1897.

The provisions at that time in force with regard to

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the liability of municipal corporations, and the manner of bringing and maintaining an action for damages sustained by reason of default to keep public roads, streets, bridges and highways in repair were sec. 531 of "The Consolidated Municipal Act, 1892," 55 Vict. ch. 42 (O.), as amended by 57 Vict. ch. 50, sec. 13 (O.) and 59 Vict. ch. 51, sec. 20 (O.). There is a further amending enactment, 60 Vict. ch. 45, sec. 18 (O.), but it does not affect the question arising in this action.

This section (531) from the time of its first enactment has been the subject of much legislative attention, and under it has gradually expanded into its present proportions.

Before the Consolidated Act of 1892, while there was the declaration of general liability of all corporations for damages arising from their default to keep in repair, there was no provision making it obligatory upon a person having a cause of action against two or more municipalities who were jointly liable for the keeping in repair, to bring his action against all of such municipalities. This was first introduced in 1892 as an addition (sub-section 7) to section 531.

It is to be observed that while section 531 (1) speaks of corporations being liable, sub-section 7 speaks of municipalities, but no doubt, having reference to sections 2 to 8 of the Act, municipality and corporation must be taken to mean the same thing, and the word "corporation" to include a county, a union of counties, and a union of townships, as well as a township, city, town and incorporated village.

After the enactment of sub-section 7 any person complaining that he had sustained damages by reason of the default of any corporation, or of any two or more corporations jointly, to keep in repair any public road, street, bridge or highway under its or their jurisdiction was entitled to maintain an action if brought within three months after the damages were sustained, but where two or more were liable jointly he was obliged to bring his action against them all.

But no notice of action was required to be given to any corporation or corporations.

Then came the Act of 1894, 57 Vict. ch. 50, sec. 13 (O), which added to section 531 (1) certain provisoes, one of which was that no action should be brought to enforce a claim for damages under this sub-section [531 (1)] unless notice in writing of the accident and the cause thereof had been served upon or mailed through the post office to the mayor, reeve, or other head of the corporation, or to the clerk of the municipality, within thirty days after the happening of the accident.

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Moss,
J.A.

Now, if that provision had been permitted to remain unchanged it would now be a prerequisite to the maintenance of any action against a corporation or corporations for damages by reason of default to keep in repair, that the defendants should have been notified in writing of the accident and the cause of it within thirty days after it happened.

But in 1896 was passed the amendment which has given rise to the present difficulty. By 59 Vict. ch. 51, sec. 20 (O.), sec. 531 (1), as amended by section 13 of the Act of 1894, was further amended by the addition after the word "accident" in the twelfth line of section 13 of certain words, so that the whole proviso was made to read as follows: "And provided also that no action shall be brought to enforce a claim for damages under this sub-section unless notice in writing of the accident and the cause thereof has been served upon or mailed through the post office to the mayor, reeve, or other head of the corporation, or to the clerk of the municipality within thirty days after the happening of the accident when the action is against a township, and within seven days when the action is against a city, town or incorporated village."

If the proviso had been enacted in its present shape in the first instance it would have appeared reasonably plain that the intention of the Legislature was only to impose the necessity for notice in the cases of the specified actions and not in all cases. But it is argued that the object of the amendment of 1896 was not to do away with the necessity for notice in any case but to shorten the period

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within which notice must be given in the cases of cities, towns, and incorporated villages.

But the proviso must now be read as a whole and, I think, as if it had been all enacted at the same time. And we are not to assume a mistake in the enactment. As said by Grove, J., in speaking of the Sunday Closing (Wales) Act, 1881: "The draftsman of this Act may have made a mistake. If so the remedy is for the Legislature to amend it. But we must construe Acts of Parliament as they are without regard to consequences except in those cases where the words used are so ambiguous that they may be construed in two senses, and even then we must not regard what happened in Parliament but look to what is within the four corners of the Act and to the grievance intended to be remedied or in penal statutes to the offence intended to be corrected:" *Richards v. McBride* (1881), 8 Q. B. D. 119, at p. 123.

It is said that before the amendment of 1896 notice had to be given to all corporations within thirty days, otherwise no action whether against one corporation alone or against two or more jointly could be maintained, and that we ought not to credit the Legislature with the intention to relieve persons from giving notice where an action must be against a county, or a union of counties, or against any two or more corporations.

On the other hand, until the amendment of 1894, an action might have been maintained against any corporation alone, or against any number jointly, without any notice at all, and it is quite as fair to credit the Legislature with the intention to revert to that condition of the law except in the specified cases.

I can find in the language of the enactment as it now stands, no such ambiguity as compels me to endeavour to read its words otherwise than in their commonly understood sense.

I find it very difficult to accommodate them to any case of an action against two or more corporations jointly in which the time for giving the notice is not the same.

I think the safer course is to read the words according to their plain literal meaning as applying only when the action is against townships alone, or against cities, towns or incorporated villages alone, and not to the case of an action against a township and one or more other municipalities or corporations jointly.

Judgment.

Moss,
J.A.

I think the judgment of the Divisional Court should be affirmed.

LISTER, J. A. :—

I am of the same opinion.

MACLENNAN, J. A. :—

I am of opinion that we ought to allow this appeal. The question depends on the proper construction of sub-sec. 1 of sec. 531 of the Municipal Act of 1892, 55 Vict. ch. 42 (O.), as amended by sec. 13 of the Act of 1894, ch. 50, and also by sec. 20 of the Act of 1896, ch. 51. Sub-section 1 is the section which gives an action against a municipality for damages sustained by reason of non-repair, and without which no such action would lie: *Pictou v. Geldert*, [1893] A. C. 524. The amendments then say that no action shall be brought to enforce a claim for damages under the sub-section unless notice is given to an officer of the corporation within thirty days after the accident, when the action is against a township, and within seven days when it is against a city, town or incorporated village. It is said that because this is an action against two municipalities, namely, a township and an incorporated village, no notice is necessary. To my mind it is impossible to assent to that proposition. If this is an action brought to enforce a claim for damages under the sub-section, then the Legislature has declared, as plainly as words can do it, that thirty days' notice must have been given if it be against a township, and seven days if it be against an incorporated vil-

Judgment. MACLENNAN, J.A. lage. It must be admitted that the action is brought under the section; otherwise it could not be brought at all. It must also be admitted that it is an action brought against a township, and also against a village. It is none the less brought against one, because it is also brought against the other; and, in my judgment, there is no ground on which one can hold that the statute is inapplicable. So to hold is productive of no wrong, or injustice, or inconvenience. The plaintiff might have given his notice to each municipality within the proper time, and then have brought his action. He has neglected to do so as regards the village, and that corporation is discharged. I agree with my brother Ferguson, that the consequence is that he cannot sue the other municipality either: for sub-section 7 of the same section 531 enacts that if an action shall be brought for damages for default of repair, it shall be brought against all the municipalities liable. By omitting to give notice in time to the village, he has made it impossible to do what the Legislature has said he shall do, namely, to bring it against the two municipalities liable. It is not another or different action which is spoken of in sub-section 7, but the same action which is given by sub-section 1, and so it cannot be brought without the prescribed notice.

I think that the appeal should be allowed, and that my brother Ferguson's judgment should be restored.

Appeal dismissed, MACLENNAN, J.A., dissenting.

R. S. C.

ELGIE V. BUTT.

Arrest—Foreigner—Staying Temporarily in Ontario.

A foreigner, who contracts a debt in the country of his domicile and then comes to this Province to stay temporarily, cannot be arrested here in respect of that debt, when in good faith about to leave this Province to return home.

Judgment of a Divisional Court reversed.

THIS was an appeal by the defendant James Butt from Statement. the judgment of a Divisional Court [ARMOUR, C.J., FALCONBRIDGE, and STREET, JJ.].

The following statement of the facts is taken from the judgment of OSLER, J. A. :—

This is an appeal by the defendant James Butt from an order of the Queen's Bench Division, reversing an order of the junior Judge of the County Court of Huron, acting as a local Judge of the High Court, to discharge the defendant out of custody under an order for his arrest which had been previously made in the action. No reasons for the judgment below are reported.

The leading facts of the case are hardly in dispute, and the only question is, whether the defendant was entitled to be discharged out of custody under Consolidated Rule 1047, on the ground, which was the only one relied upon, that he was not about to quit Ontario with intent to defraud his creditors generally or the plaintiff in particular, who was in fact his only creditor in the Province.

It appears that the defendant left this Province in the year 1889 and went to the Province of Manitoba to settle there, and from thence until the time of his arrest he was a resident of and domiciled in that Province. He was not then indebted to any one. He made a short visit to his friends here in December, 1893. In December, 1896, he came here again on a visit for two or three months, having taken a return ticket which would expire about the middle of the following March, and was just about to return to Manitoba when he was arrested. It was known to the

Statement. plaintiff and his friends that his visit was a temporary one and that he intended to return. The debt for which he was arrested was incurred under the following circumstances : the plaintiff went to Manitoba in March, 1891, also intending to settle there, and bought a farm from the defendant, for which he paid \$500 on account of the purchase money, but in December of the same year he determined to return to Ontario, and the defendant took the farm off his hands, giving him his promissory note for a sum which represented the amount so paid by the plaintiff on account, besides the price of a horse sold by the plaintiff to the defendant, and the value of some plowing which the plaintiff had done upon the farm. When the defendant visited Ontario in December, 1893, he gave the plaintiff another note, which is the note sued on, in lieu of the former or of a renewal of it, which had been accidentally destroyed. This renewal note purports to be made, as the former had been, at Cypress River in Manitoba, and it was payable in that Province. The plaintiff had in the meantime, about August, 1893, been in Manitoba and had received \$100 from the defendant on account of accrued interest on his claim. The new note above spoken of was payable in twelve months and bore interest at the rate of seven per cent. Further facts disclosed in the affidavits and depositions are that shortly before the defendant left Manitoba in December, 1896, he disposed of two farms which he owned or had an interest in. For one he received the purchaser's note for \$1,000, and for the other he took a mortgage of \$400 or thereabouts on account of the purchase money in the name of his father, the defendant Elam Butt, though without his consent or knowledge, who, when it did come to his knowledge, disclaimed it and transferred or assigned it to his co-defendant. It may be inferred from what the defendant stated in his examination that he thus disposed of his property with intent to defeat or delay a Manitoban creditor who was suing him upon a note which he had endorsed or become party to as surety for a friend there. After the

defendant came down on his last visit he saw the plaintiff several times. They met on the 8th of January and the claim was discussed and \$30 paid on account. The plaintiff says that the defendant was anxious to settle. What he wanted was that the defendant should pay, which he was unable to do, or get his father to become security for him. The defendant offered the \$1,000 note, and, as he says, also the mortgage, as security, but the plaintiff would not take them. The plaintiff denies that the mortgage was offered, but I think the proper inference is that it was proposed as security, but that the plaintiff had not made up his mind whether he would take it or not. When they separated the defendant was to be absent for a couple of weeks visiting other friends in Ontario, and the plaintiff was to let him know then when to see him again and resume, as I understand it, their negotiations. The plaintiff did write, but something interfered to prevent the defendant from coming at the time appointed. There is no reason to believe that his failure to do so was from any desire to avoid the plaintiff, and he was in fact on his way to the plaintiff's house, and within half a mile of it, with his papers in his pocket, in order, as he says, to try to carry out a settlement, when he was arrested. The defendant's failure to keep his appointment seems to have been, according to the plaintiff's own evidence, the real reason why he arrested him, as he inferred from that circumstance that he intended to leave Ontario without seeing him again.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 26th of September, 1898.

W. M. Douglas, for the appellant. This case is distinguishable from *Coffey v. Scane* (1894), 25 O. R. 22; (1895), 22 A. R. 269; for there the debtor when he first left Ontario, left with intent to defraud, and from *Meyer Rubber Company v. Rich* (1891), 14 P. R. 243, for there the

Argument. debtor not only left his own country with fraudulent intent, but was also about to leave Ontario, not to return to his own country but to escape still further from the pursuing creditor. This case comes within the exception pointed out in *Robertson v. Coulton* (1881), 9 P. R. 16, at p. 18; and see also *Clements v. Kirby* (1877), 7 P. R. 103; and *Tooth v. Frederick* (1891), 14 P. R. 287. *McVeain v. Ridler* (1897), 17 P. R. 353, is also distinguishable, for there the debt had been incurred in Ontario.

Garrow, Q.C., for the respondent. This case is not at all like the case of *Clements v. Kirby* (1877), 7 P. R. 103, which seems in conflict with the later case of *Kersterman v. McLellan* (1883), 10 P. R. 122. In the present case the appellant had been in the Province for some months before the arrest; he had no home in Manitoba; he had converted his assets there into a portable form; he had been applied to after his return to Ontario for payment by the respondent, and he had broken his promise to see him. He was not only about to remove his body out of the jurisdiction but to take with him his assets available for payment of his debts, and the inference of an intent to defraud was, therefore, clear. Where, as here, the debtor is within the jurisdiction, and is about to depart while indebted to a creditor resident here, a *prima facie* case is made for arrest: *Robertson v. Coulton* (1881), 9 P. R. 16; *Coffey v. Scane* (1894), 25 O. R., at p. 32. The other facts relied on by the appellant to justify his discharge from arrest, such as his former residence in Manitoba, and his alleged intention to return there, are only valuable as bearing on the question of the intent to defraud: *Erickson v. Brand* (1888), 14 A. R. 614, at p. 653. If such intent is not to be presumed from the mere fact of the intention, in the case of a person domiciled here, to depart from this Province, as seems to be the fair inference from *Robertson v. Coulton*, approved of in the cases of *Erickson v. Brand*, and *Coffey v. Scane*, in this Court, and followed by the Queen's Bench Division in *McVeain v. Ridler* (1897), 17 P. R. 353, it certainly may in this case be fairly presumed in the light

of the additional facts appearing in evidence here, namely, Argument.
the circumstances under which the appellant left Manitoba, his dealings with his property there, and his failure to keep his engagement to meet the respondent and satisfy his claim. Even if the case of *Tooth v. Frederick* (1891), 14 P. R. 287, relied on by the appellant, is not overruled, as it is treated in *McVeain v. Ridler*, the circumstances there were quite different from those in this case. There, the debtor had, before his arrest, executed an assignment of his assets for the benefit of his creditors. Here the debtor took the mortgage, forming part of his assets, in the name of his father, residing in Ontario, to keep it out of the reach of creditors, and converted the balance of his assets into promissory notes, which he proposed to take with him out of Ontario, on his proposed departure from this Province. See also *Butler v. Rosenfeldt* (1879), 8 P. R. 175; *Smith v. Smith* (1883), 9 P. R. 511.

W. M. Douglas, in reply.

January 24th, 1899. The judgment of the Court was delivered by

OSLER, J.A. :—

Upon this state of facts I have no difficulty in arriving at the conclusion that the order of the learned junior Judge of the County Court directing the discharge of the defendant from custody was right and ought to be restored.

The general rule undoubtedly is that a foreigner (and that is the status of the defendant as regards these proceedings) who has contracted the debt sued for in the country of his domicile, his ordinary place of abode, and who is about to return thither after a temporary visit to this country, cannot properly be arrested, where no other facts than these appear, as being a debtor who is about to leave this Province with intent to defraud his creditors: *Smith v. Smith* (1883), 9 P. R. 511; *Robertson v. Coulton*

Judgment. (1881), *ib.* 16; *McPhadden v. Bacon* (1873), 9 C. L. J. 226;
OSLER, *Erickson v. Brand* (1888), 14 A. R. 614, 653; *Ex parte*
J.A. *Crispin* (1873), L. R. 8 Ch. 374; *Ex parte Gutierrez* (1879),
11 Ch. D. 298.

I think that even in such a case it might be shewn that the intended departure was, notwithstanding, with intent to defraud, and here the defendant's failure to keep his appointment was a circumstance well calculated to provoke the plaintiff's suspicions.

But whatever may be thought of the defendant's reason for disposing of his property in Manitoba, it cannot affect the question of his intent in returning thither. He seems, to the extent of his means, to have intended to deal honestly with the plaintiff, and apart from the fact which excited the latter's suspicions, his actions were consistent with that view. If his explanation be accepted, as I think it ought to be; and if he was, as the plaintiff hardly seems to deny, on his way to see and settle with him when he was arrested, it was, in my opinion, rightly held that a proper case for his discharge from custody was established on the ground that he was not about to quit Ontario with intent to defraud the plaintiff.

The appeal should therefore be allowed and the original order restored with costs throughout.

Appeal allowed.

R. S. C.

COCKBURN V. IMPERIAL LUMBER COMPANY.

*Water and Watercourses—Timber—Saw Logs Driving Act—R. S. O. (1887)
ch. 121—Arbitration and Award.*

When a person floating logs down a stream fails to break jams of such logs, as directed by section 3 of The Saw Logs Driving Act, another person whose logs are obstructed by the jam has no right of action for damages, but is limited to the remedy given by the Act, namely, the breaking of the jam at the expense of the person whose logs have formed it.

When an arbitrator awards one sum in respect of matters, some of which are within, and some without his jurisdiction, the award must be set aside.

Judgment of ROSE, J., reversed.

THIS was an appeal by the defendants from the judgment of ROSE, J. Statement.

The plaintiffs and the defendants were the owners of timber limits on the banks of Deer creek in the district of Nipissing, and in the months of April and May, 1896, were floating logs down that stream. The logs formed a jam, and the plaintiffs, alleging that the defendants were responsible for the jam and had failed to take proper steps to break it, served upon them, in assumed compliance with the provisions of The Saw Logs Driving Act, R. S. O. (1887) ch. 121, a notice claiming "\$5,011.35, being amount of loss sustained by us in consequence of the detention by you of our logs in Deer creek," and naming an arbitrator. The defendants then served upon the plaintiffs a notice appointing an arbitrator in respect of this claim, and claiming on their own behalf \$474.53, proportion of the expenses of breaking the jam and of booming and keeping possession of the plaintiffs' logs, \$10,000 damages for detention of logs by reason of the jam, and \$1,251.25 loss sustained by reason of possession taken by the plaintiffs of some of the defendants' logs.

The arbitrators appointed by the plaintiffs and defendants appointed a third arbitrator, but then, by consent, His Honour Judge Valin was appointed sole arbitrator, and he, after hearing evidence, awarded the plaintiffs

Statement. \$1,376 "damages by reason of the detention of their logs on Deer creek during the driving season of 1896 by the act and neglect of" the defendants.

This action was brought to enforce this award, and was tried at Barrie, on the 22nd of November, 1897, before ROSE, J.

In the statement of defence objection was taken to the validity of the submission to His Honour Judge Valin, and there was much discussion, both at the trial and in this Court, upon that point, and also as to the scope of the submission, but it is not necessary to deal with these questions for the purposes of this report.

The arbitrator was examined at the trial and stated that the \$1,376 awarded was made up of \$1,276, damages for delay or detention, and \$100, damages for the taking of possession by the defendants of the plaintiffs' logs, and the only point of general interest in the case was whether, assuming his power to act at all, the arbitrator could, under the Saw Logs Driving Act, award damages for delay caused by a jam of logs.

On the 7th of January, 1898, judgment was given by

ROSE, J.:—

I was much assisted at the trial by counsel in arriving at the point for determination, and I may refer to what was then said by me as to what remained to be disposed of after hearing the statement of counsel on both sides. I then stated to Mr. Gamble as follows:—"If, upon the statute and the notices, it was open for you in this reference to claim damages for delay in floating your logs down the stream, the defendants have no defence, but if, upon the statute, that is not a subject matter of reference, or the notices did not make it a subject matter of reference, the defendants' contention is that the arbitrator considered and determined something that was not referred to him."

The statute is ch. 121, R. S. O. (1887).

Section 3 provides, to use the language of the marginal note, that persons floating logs in a river, etc., are not to obstruct floating or navigation.

Judgment.

ROSE, J.

Sections 4 and 5 *et seq.*, provide for persons who are obstructed clearing the river at the expense of the person obstructing.

Section 8 gives a lien upon the logs for a fair proportion of the charges and expenses of breaking jams, etc.

Section 13 provides for damages for without just cause taking possession of or detaining logs of another person.

Section 16 provides that "all claims, disputes and differences arising under this Act shall be determined by arbitration as hereinafter provided and not by action."

Section 17 provides for giving notice appointing arbitrators as follows:—"The person claiming that another person has not complied with the provisions of this Act, or claiming payment of any charges or expenses under this Act, or claiming a lien upon any logs, or claiming damages under section 13, shall give to such other person notice in writing, stating the substance of the claims made, and appointing an arbitrator, and calling upon such other person to appoint an arbitrator within ten days after the service of the notice," etc.

This provision, it seems to me, covers claims in four cases: first, under section 3, where a person in floating logs down the river has obstructed the floating or navigation, and the person whose logs have been obstructed claims that the other person has not complied with the provisions of this Act; second, under sections 4, 5, 6 and 7, claiming payment of any charges or expenses; third, under section 8, claiming a lien upon any logs, and fourth, under section 13, claiming damages for taking possession of or detaining logs without just cause.

The notice in this case served by the plaintiffs was as follows:

[The learned Judge read the notice and continued:]

The arbitrator assessed damages to the plaintiffs by "reason of the detention of their logs on Deer creek during

Judgment.

ROSE, J.

the driving season of 1896 by the act and neglect of the Imperial Lumber Company," etc. He was examined at the trial, and stated that he allowed for general detention of logs \$1,276, and for illegal detention under the lien asserted by the defendant company \$100.

I find as a fact, upon the material before me, that the general detention and the detention under the alleged lien were both during the months of April and May, and that what was done on the first day of June, under the warrant referred to in the evidence, was but a continuation of the assertion of the right of lien which the defendants made. It seems to me, that being so, that it was referred to the arbitrator to determine a claim, dispute and difference arising under the third and seventeenth sections of the Act, and that such claim was that the defendant company had failed to comply with the provision of the Act inasmuch as they had obstructed the floating and navigation unreasonably, and was also for damages under sections 13 and 17 of the Act, for wrongfully asserting a right of lien upon the logs. I think that what the arbitrator did was clearly within the scope of the reference, as provided for by the statute, and as contained in the notices. I do not find it necessary, therefore, to go on and consider how far what took place before the arbitrator was a parol submission, or how far it was within the authority of the solicitor and binding upon the defendant company.

There must be judgment for the plaintiffs for the amount mentioned in the award, and costs of the arbitration and award to be taxed, with interest and costs of the action.

The defendants' appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, and LISTER, J.J.A., on the 12th of October, 1898.

Aylesworth, Q.C., for the appellants.

H. D. Gamble, and *H. L. Dunn*, for the respondents.

January 24th, 1899. The judgment of the Court was delivered by

Judgment.

LISTER,
J.A.

LISTER, J.A. :—

The right of the plaintiffs to recover on the award is dependent upon the construction to be applied to the various sections of "The Saw Logs Driving Act," which was passed in the year 1887, and which, it is quite probable, was passed on account of prolonged and familiar litigation arising out of the floating or driving of saw logs. It is at all events obvious that the design of the Legislature in this statute was to define and regulate the duties, rights, and liabilities of persons using the waters of the Province for driving or floating logs, and to create a special tribunal for the adjustment of all claims, disputes and differences arising under it.

Section 16 in express words declares that all claims, disputes and differences arising under the Act shall be determined by arbitration as thereafter provided, and not by action. The Act creates new rights, imposes new duties, prescribes new remedies, and constitutes a special tribunal for the settlement and adjustment of all claims, disputes and differences arising under it.

The plaintiffs base their right to recover \$1,276 of the amount awarded, upon the ground that a statutory duty was imposed on the defendant company by section 3 of the Act to break jams of their logs, and which duty the defendant company neglected or failed to discharge, resulting in damage to the plaintiffs to the extent of the last mentioned amount, and that the arbitrator had, for breach of that duty, power and jurisdiction to award such damages.

The contention of the defence is that admitting the failure of the defendant company to break jams as required by section 3 it is not liable in damages, because the remedy for such failure or neglect is prescribed by the Act imposing the duty, and that the remedy thus prescribed, and it only, can be pursued by the plaintiffs.

Judgment.

LISTER,
J.A.

Apart from the arbitration clauses of the Act it may be divided into three groups, each group imposing by one section duties and obligations on persons driving saw logs, followed by two sections declaring the rights and remedies of persons who may be injured by the neglect of the person upon whom such duties are imposed to perform them. These groups consist of, firstly, sections 3, 4 and 5; secondly, sections 6, 7 and 8; and thirdly, sections 9, 10 and 11.

Section 3 declares that any person putting or causing to be put into any water logs for the purpose of floating the same in, upon or down such water, shall make adequate provision and put on a sufficient force of men to break jams, and shall make all reasonable endeavours to break jams of such logs and clear the same from the banks and shores of such water with reasonable despatch, and run and drive the same so as not to unnecessarily delay or hinder the removal, floating, running or driving of other logs, or unnecessarily obstruct the floating or navigation of such water. Section 4 makes it lawful, in the event of neglect to comply with the provisions of section 3, for any person desiring to float logs in or upon such water, and whose logs are obstructed by a jam, to break the same; and section 5 gives such person a lien upon the logs forming the jam for the expenses of breaking the jam.

Sections 6 and 9 impose certain other duties relating to the driving of logs: and sections 7 and 8 and 10 and 11, prescribe the rights of persons other than the person upon whom the duty is imposed, as well as the remedy for neglect by the person upon whom the duty is imposed; these sections give practically the same rights and remedies as are given by sections 4 and 5.

It is significant, as indicating the intention of the Legislature, that the Act, while providing for proceedings being taken for the recovery of damages by the person who has neglected to discharge the duties imposed by sections 3, 6 and 9, against the person who has interfered under sections 4, 7 and 10, nowhere, in express terms, gives a right to

recover damages against the person who has neglected to discharge the duties imposed by sections 3, 6 and 9. In other words, no right is given to recover damages for neglect of the person owning the logs which may form a jam to break the same, as required by section 3. From this it may be reasonably inferred that the intention of the Legislature was that the penalty for default should be the breaking of the jam at the cost of the person whose logs formed the same.

Judgment.

 LISTER,
J.A.

Upon a fair reading of the Act, it seems to me that nothing more than this was contemplated by the Legislature, and were it not for section 17, I should have no hesitation in arriving at the conclusion that the case comes within the well settled rule that when a statute imposes a duty and the same statute prescribes a special remedy for failure to discharge the duty so imposed, that remedy, and that alone, can be invoked.

It was contended by counsel for the plaintiffs that section 17 must be read in conjunction with section 3, and that reading the two sections in this way a right is conferred to recover damages for delay in driving in addition to the special remedy provided by sections 4 and 5: in other words, that the Act confers cumulative remedies.

Upon careful consideration, I am unable to adopt this view. It seems to me that the first line and a-half of section 17, which is the only part of the section affecting the point now under discussion, has reference only to such portions of the Act as do not give a special or particular remedy. I think, therefore, that the arbitrator, in awarding damages for the delay or detention caused by neglect of the defendant company to break the jam, as required by section 3, exceeded his jurisdiction.

It was argued that the detention mentioned in section 13 referred to and included the delay mentioned in section 3.

I do not think so. It seems to me clear that the detention mentioned in section 13 is detention following the taking possession of logs under sections 5, 8 and 11, and is not the delay caused by jams mentioned in section 3.

Judgment.

**LISTER,
J.A.**

The remaining question for consideration is the validity of the award. The arbitrator has awarded one entire sum on matters within and matters not within the scope of his authority as an arbitrator acting under the Act. Mr. Russell, in the 7th edition of his work on arbitration, at p. 331, states the law in these words: "If the arbitrator award collectively on matters within and matters not within the submission, so that the Court cannot see how much of the adjudication applies to each, the award will be bad *in toto*."

See also *Jackson v. Clarke* (1825), McClel. & Y. 200; *Duke of Buccleuch v. Metropolitan Board of Works* (1868), L. R. 3 Ex., at p. 321; *Webster v. Black* (1841), 6 O. S. 105; *Harrington v. Edison* (1853), 11 U. C. R. 114; *Faulkner v. Saulter* (1850), 1 P. R. 48; *In re Marshall and Dresser* (1843), 3 Q. B. 878.

I think the award is bad, and that the appeal should be allowed and the action dismissed with costs.

Appeal allowed.

R. S. C.

DOUGLAS V. STEPHENSON.

Defamation—Libel—Newspaper—Fair Comment.

Statement.

AN appeal by the defendant from the judgment of a Divisional Court, reported 29 O. R. 616, was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 1st and 2nd of February, 1899, and on the 3rd of February, 1899, was dismissed with costs, the Court agreeing with the judgment of the majority in the Court below.

King, Q.C., for the appellant.

Shepley, Q.C., for the respondent.

R. S. C.

O'CONNOR V. GEMMILL.

Solicitor—Agreement for Compensation—Champerty—Exchequer Court—Taxation.

An agreement by a solicitor to prosecute a claim to judgment at his own expense in consideration of his receiving one-fourth of the amount which should be recovered is champertous and void.

Per Moss, and LISTER, JJ.A. A solicitor of the Supreme Court of Judicature for Ontario who as such does business in carrying on proceedings for a client in the Exchequer Court of Canada is subject to the provisions of the Solicitors' Act with regard to delivery and taxation of his bill of fees, charges or disbursements in respect of such business. Judgment of a Divisional Court, 29 O. R. 47, reversed in part, OSLER, J.A., dissenting as to the result.

AN appeal by the plaintiff, and a cross-appeal by the Statement. defendants, from the judgment of a Divisional Court [BOYD, C., FERGUSON, and ROBERTSON, JJ.] reported 29 O. R. 47, were argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 23rd of September, 1898. The facts are stated in the report below and in the judgments in this Court and the line of argument is there indicated.

F. A. Anglin, for the plaintiff.

Arnoldi, Q.C., for the defendants.

January 24th, 1899. BURTON, C.J.O.:—

In this action, which was for the recovery of a balance in the hands of the defendants, a firm of solicitors, recovered by them for the plaintiff from the Government of Canada, the defendants set up as a defence payment in full after deducting their fees, charges and disbursements, and a release under seal.

This release was subsequently waived and the defendants set up a written agreement fixing their charges at a certain sum, which agreement was impeached as champertous. A consent judgment was arrived at, in which an order was made that the defendants should

Judgment.
BURTON,
C.J.O.

within two weeks, deliver to the plaintiff a bill of their costs, charges and disbursements in the action in which the recovery was made, and that the action and the bill when so delivered should be referred to Mr. Thom, one of the taxing officers, to determine :

1st. Whether the agreement was valid and binding on the plaintiff.

2nd. Whether the plaintiff was entitled to the delivery and taxation of a solicitor and client bill of costs, and if so entitled to tax the bill ; and

3rd. If not entitled, whether the sum of \$1,775 was a fair and proper allowance to the defendants.

The referee held the agreement champertous, and all the Judges before whom the case has come have been unanimous in upholding that view, but he further held that the bill which had been delivered pursuant to the consent judgment was liable to taxation.

The question as to the delivery of a bill was not open either before the referee or the Divisional Court, for the parties had expressly consented to the judgment authorizing such an order ; and I should have thought that such a consent almost involved a consent to a taxation. But it does not seem to me to be of very great moment which view is adopted, whether the referee should decide it upon a taxation or upon evidence as to a *quantum meruit*.

My own view is that the judgment of Meredith, J., in upholding the ruling of the referee, was correct and should be restored, and that the plaintiff should be entitled to the costs of the appeal to the Divisional Court.

OSLER, J. A. :—

The appeal and cross-appeal appear to me to be equally unprofitable. As to the latter, the very statement of the terms of the agreement by which the defendants undertook to prosecute the plaintiff's claim against the Crown shews it to be champertous. They take thereby an assignment of the claim to themselves, and stipulate that

they shall prosecute the suit at their own expense, and if they prevail that the property recovered shall be divided in the proportion of one-fourth to themselves and three-fourths to the plaintiff. Many transactions which were formerly illegal on the ground of maintenance or champerty, which is a species of maintenance, are now rendered permissible by statute, but I have found nothing which saves such an agreement as this. Even in so recent a case as *Hutley v. Hutley* (1873), L. R. 8 Q. B. at p. 114, Lush, J., speaks of champerty as the most odious form of maintenance. In *Guy v. Churchill* (1888), 40 Ch. D. 481, 488, the law on the subject is discussed by Chitty, J., and the authorities cited, and of just such an agreement as we have before us, Jessel, M.R., in *In re Attorneys and Solicitors' Act, 1870* (1875), 1 Ch. D. 573, says, that it is in his opinion "pure champerty, as it gives to the solicitor, in the event of success, what is equivalent to a tenth part of the property to be recovered." See also *Strange v. Brennan* (1846), 15 Sim. 346; *Grell v. Levy* (1864), 12 W. R. 378; Cordery on Solicitors, 2nd ed., p. 233; *Bradlaugh v. Newdegate* (1883), 11 Q. B. D. 1.

Then as to the plaintiff's appeal, the terms of the consent judgment are to be attended to. The agreement being illegal and not binding on the plaintiff, it remains that the defendants are entitled to be paid for their services in carrying the action in the Exchequer Court to a successful conclusion, and there being no tariff of costs as between solicitor and client in that Court, the value of such services is necessarily to be ascertained as upon a *quantum meruit*—what under all the circumstances they may appear to have been reasonably worth. Some particulars of the defendants' claim must be furnished, and by the consent judgment a bill of their costs and charges is ordered to be delivered, which, the agreement being out of the way, the officer to whom the action and the bill are referred will deal with in ascertaining the proper sum to be allowed to them. What further relief the plaintiff can reasonably ask I do not

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

know. She has got particulars of her solicitors' demand, whether they are called a bill of costs or particulars of set-off does not matter in the least, as there is no tariff of costs; and as the solicitors are setting up their demand by way of set-off or as a lien or claim upon the fund which the plaintiff is seeking to recover from them, no answer to it is open to her under the Solicitors' Act (if that Act applies to their demand at all) on the score of the non-delivery of a bill of costs before action. If there are items in the party and party tariff in the Exchequer Court which correspond to any of the charges for matters connected with the actual litigation that tariff may assist the referee in determining what should be allowed for these, but the greater part of the solicitors' demand evidently relates to services performed out of Court of a much more important and valuable character, difficult to measure by an allowance of so much per day or per hour, and more appropriately compensated by a general allowance in the nature of a commission, the amount of which may be as much as or less than that mentioned in the agreement, and which the officer may be assisted in arriving at by considering the details specified in the particulars delivered.

Passing now to the terms of the consent judgment. Some of these are quite unintelligible. There is first a direction that the defendants shall deliver a bill of their costs. That is reasonable and plain enough. Then the officer is to determine whether the agreement is a "valid and binding" one, and to decide whether in view of the action having been brought in the Exchequer Court, and having regard to the agreement, if held to be a valid and binding agreement, the plaintiff is entitled to the delivery of a solicitor and client bill of costs and taxation thereof, and if so entitled then to tax the bill so delivered as between solicitor and client. In the next clause the judgment proceeds to direct that if the plaintiff be not so entitled, *i.e.*, to the delivery and taxation of a bill of costs, the officer is to consider and determine, having

regard to the agreement, if the same be held "valid and binding," whether the sum of \$1,775 (*i.e.*, the balance of the sum which would be payable under the agreement) is a fair and proper allowance to the defendants for their services, etc., in the action, and if not, what would be a fair and proper compensation therefor.

To my mind these two clauses are senseless, because, if the agreement "be held valid and binding"—the only contingency in which the referee is to "tax" the bill under the one or moderate the demand under the other—the agreement, and nothing else, determines the *quantum* of the compensation. No doubt there has been some mistake in settling or formulating the terms of the consent judgment, but as it stands I agree with the learned Chancellor that the only meaning which can be taken out of it is that the action and defendants' set-off are referred to the taxing master, who is, in any event, to ascertain and settle what the defendants are to be allowed for their services, and, if the agreement is invalid, there is nothing to limit this from being done as upon a *quantum meruit*; in other words it is not a reference of a bill of costs to be taxed under the Solicitors' Act whatever that may involve—hardly enough, one would have thought, to have made it worth while to bring this appeal. In the view I take of the case it is not necessary to express an opinion whether the bill of a solicitor of the Court of Exchequer for business done in that Court or in relation to a claim pending in that Court is taxable under the Solicitors' Act merely because the same person happens also to be a solicitor of the High Court. That the Supreme or Exchequer Court has declined to frame a tariff as between solicitor and client does not assist the argument in favour of the plaintiff's contention, and some of the analogies which have been suggested arising in English practice seem open to the observation sometimes made upon the argument from analogy.

At present I will only say that I am not convinced that the view expressed by the learned Chancellor in the Court below is wrong.

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

I think the appeal and cross-appeal should be dismissed. I must add in reference to the ground on which I understand some of the judgments in this Court proceed that it was not suggested on the argument of the appeal that the bill of costs delivered would not, under the judgment of the Divisional Court, stand as the particulars of the set-off. There is certainly nothing in the judgment of this Court which suggests that. The whole contention before us—an utterly fruitless one, it seems to me, except as a matter of costs—was that the plaintiff was entitled to a delivery and taxation of the bill, that is to a taxation as under the Solicitors' Act of the bill delivered. The latter is the only thing which she does not get under the judgment appealed from. What advantage she will derive therefrom now that she is held to be entitled to it, if it be so held, I confess I am unable to perceive.

MACLENNAN, J.A.:—

The agreement of the 18th of March, 1895, was held to be invalid by the taxing officer, and his decision on that point has been affirmed by Mr. Justice Meredith and by the Divisional Court. The defendants have cross-appealed against that part of the judgment, and that is the first question to be determined. I am clearly of opinion that in that respect the judgment is right. The agreement is expressly champertous in terms, for it stipulates for a commission of twenty-five per cent. to be retained by the solicitors out of the money to be recovered in the exchequer action, as remuneration for their services in carrying on the proceedings, in addition to their disbursements to witnesses, and any costs which might be recovered from Her Majesty: *In re Attorneys and Solicitors' Act, 1870* (1875), 1 Ch. D. 573. The maintenance of an action, of which champerty is one species, is a common law offence: Pollock on Contracts, 6th ed., p. 320; *Pechell v. Watson* (1841), 8 M. & W. 691; and is, therefore, an offence against the law, no matter in what Court the action may be

brought, whether in the High Court or in the Exchequer. Judgment.
 The defendants' cross-appeal must therefore be dismissed. MACLENNAN,
J.A.

The taxing officer, besides deciding that the agreement was invalid, also certified that the plaintiff was entitled to the delivery of a solicitor and client bill and to the taxation thereof. Mr. Justice Meredith dismissed the defendants' appeal altogether. But the Divisional Court, while affirming his judgment as to the invalidity of the agreement, reversed him as to the right of the plaintiff to the delivery and taxation of a bill, and declared that the defendants' remuneration was to be determined as upon a *quantum meruit*, and that is the part of the judgment from which the plaintiff appeals. The judgment of reference is a consent judgment, whereby, among other things, a release given by the plaintiff to the defendants before action was waived and abandoned, and the defendants were ordered, within two weeks from the date of the judgment, to deliver to the plaintiff a bill of their costs, charges and disbursements incurred in the action in the Exchequer Court. There is an apparent inconsistency between this unqualified order for the delivery of the bill, and a subsequent direction of the same judgment, which directs the taxing officer to determine and decide, (if the agreement should be held not to be binding), whether the plaintiff was entitled to the delivery of a solicitor and client bill of costs and to taxation thereof. The only bill of costs, charges and disbursements which the defendants could have is a solicitor and client bill, and it is not easy to understand why after the actual delivery of such a bill had been ordered, and that by consent, the taxing officer should, nevertheless, be required to determine and decide whether it should be delivered or not. If the agreement were held to be good, the bill of costs, charges and disbursements could be of no moment, except as regards disbursements to witnesses; for it is admitted that no costs were recovered from the Crown. I think the taxing officer had no option but to decide that the plaintiff was entitled to the delivery of a bill, for the consent judgment had expressly ordered it to be de-

Judgment.
MACLENNAN,
J.A.

livered; and I also think that it was not competent to the Divisional Court so to vary the consent judgment as to declare the plaintiff not so entitled. For whatever it may be worth, the parties are bound by that part of the consent judgment and of the taxing officer's certificate; and to that extent the judgment appealed from must be reversed.

The question of taxation is a different matter. The agreement having been declared invalid, and the release having been abandoned, the case is an action by the plaintiff against her solicitors to recover a sum of money received by them on her behalf from the Crown. It is admitted that part has been paid, and the defence as to the sum unpaid is a set-off for services and disbursements in and about the recovery of the money; the services and recovery of the money having been in the Exchequer Court of Canada. There has been a consent judgment referring the action, and the bill when delivered, to one of the taxing officers of the Supreme Court of Judicature for Ontario, and it is now before him upon that reference. He has the action and the bill of costs, charges and disbursements before him, and the question is what he ought to do with it, and how he is to proceed. It seems to me, with great respect, that the question whether he is to tax the bill or not, is very much a question of the meaning of a word.

It is admitted that there is no solicitor and client tariff in the Exchequer Court. That is, the services in that Court for which a solicitor is entitled to charge his client, and the sum which he is entitled to charge therefor, are not fixed or defined by any law; and if there be no agreement between the parties, the general law of contracts for services rendered must govern, and the defendants must be paid for everything they did, in and about the business, which was reasonably necessary; and the sum to be allowed for each service must be what is reasonable, having regard to all the circumstances, and to the fees allowed for similar services in other Courts in like cases. It is for the

referee to determine and decide those two matters in this case; that is, what services ought reasonably to be paid for, and what sum ought reasonably to be paid therefor; and whether that proceeding is to be called a taxation, or by any other name, such as a *quantum meruit*, is quite immaterial.

Judgment.

 MACLENNAN,
 J.A.

While I think the discussion about the delivery of the bill is concluded by the consent judgment, yet if no delivery had been ordered, it would have been competent to the referee, and his duty, to have required the defendants to deliver particulars of their claim and to prove the items, proceedings which might well be called the delivery and taxation of a bill of costs.

It may be that services rendered in the Exchequer Court are not within the Solicitors' Act of Ontario, so as to render a solicitor liable to the summary jurisdiction of the High Court as to taxation, or as to the necessity of delivery of a bill before suing therefor. It may be also that the Exchequer Court, by virtue of its general jurisdiction, could direct a taxation at the instance of a client, but it is not necessary for us to decide any of those questions.

I think the plaintiff's appeal must be allowed. The declaration that she was not entitled to a delivery of a bill, would necessarily have been very embarrassing to the plaintiff on the further proceeding on the reference, even though it has been already delivered in pursuance of the consent judgment. It might then be contended, and with reason, that, although delivered, it ought not and could not be used for any purpose.

I think the plaintiff entitled to the costs of the appeal, both here and in the Divisional Court, thinking as I do that the certificate of the taxing officer was substantially right.

Moss, J.A. :—

It is admitted on the record by the defendants that they are a firm of solicitors, practising and residing in the city of Ottawa; that in the month of January, 1895, the plain-

Judgment.Moss,
J.A.

tiff employed them as solicitors to prosecute an action then pending in the Exchequer Court of Canada for the recovery of a large sum of money from the Crown, to which the plaintiff claimed to be entitled as personal representative of the late Honourable John O'Connor; that in the month of May, 1896, judgment was obtained by the plaintiff against the Crown in the said action for the sum of \$6,000; that in the month of June, 1896, the defendants obtained payment of the said sum of \$6,000 from the Crown as solicitors for the plaintiff, and that of this sum they have only paid to the plaintiff the sum of \$4,200.

The balance, less \$25, they claim to be entitled to retain for their fees, charges and disbursements, duly and properly payable to them in respect of their services as the plaintiff's solicitors in the said action in the Exchequer Court. As to the \$25, they explain that they retained it as a sum to be paid to one of the witnesses on behalf of the plaintiff for his expenses, but that he declined to accept that or any sum, and the defendants bring it into Court.

In their defence the defendants set up that when the plaintiff was paid the \$4,200 she executed a release and acquittance under seal, acknowledging the receipt of same in full settlement and discharging the defendants from all further accounting, and they pleaded it in bar of the action.

The plaintiff thereupon demanded particulars of the fees, charges and disbursements, referred to in the defence, and in answer thereto the defendants delivered a statement of particulars consisting of three items, viz.:

(1) Allowance for recovering judgment for the plaintiff for \$6,000, as per agreement.....	\$1500
(2) Fee to counsel.....	200
(3) Fees to certain witnesses	75
Total.....	<hr/> \$1775

In reply the plaintiff impeached the agreement referred to in the particulars as champertous, illegal and void, and alleged that she was induced to execute the

release without knowing or understanding its meaning or effect, and without having any advice or knowledge as to her rights; and for these and other reasons set forth in the pleading, claimed that the agreement and the release should be set aside or declared not binding on the plaintiff.

Judgment.

Moss,
J.A.

In and by the consent judgment agreed upon between the parties, the defendants waived and abandoned the release and consented to an order that they should, within two weeks from the date of the judgment, deliver to the plaintiff a bill of their costs, charges and disbursements, incurred in the said action in the Exchequer Court, and that this action and the bill when so delivered should be referred to Mr. Thom, one of the taxing officers, to determine: 1st, whether the agreement was or was not valid and binding upon the plaintiff; 2nd, whether, in view of the fact that the action of *O'Connor v. The Queen* was brought in the Exchequer Court and having regard to the agreement (if held valid and binding), the plaintiff was entitled to delivery and taxation of a solicitor and client bill of costs, and if so entitled to tax the bill so delivered between solicitor and client; and 3rd, whether, if the plaintiff was not entitled to delivery and taxation of a bill, the sum of \$1,775 was a fair and proper allowance to the defendants for their services and disbursements in the Exchequer Court, and if not, what would be a fair and proper compensation for such services and disbursements.

Pursuant to this judgment, a bill of costs was delivered and the same was brought before Mr. Thom, who thereupon proceeded with the reference, and determined upon the first question that the agreement was not valid and binding, and upon the second, that the plaintiff was entitled to delivery of a solicitor and client bill of costs and to taxation thereof, and, at the request of the defendants, certified his rulings in order that the matter might be appealed before proceedings were taken on the further branches of the reference.

Meredith, J., heard the appeal and affirmed the rulings. The defendants thereupon appealed to a Divisional

Judgment.

MOSS,
J.A.

Court, which agreed with the taxing officer and Meredith, J., as to the first question, but disagreed with them as to the second.

Both parties have now appealed from this decision, the defendants because the agreement was not held valid, and the plaintiff because the ruling as to delivery and taxation of a bill of costs was set aside.

I agree that the agreement was rightly held to be invalid and not binding on the plaintiff. It contains all the elements of a champertous agreement within the well-known definition by Sir Wm. Blackstone: see Lewis's Edition, Book IV., p. 135.

And the fact—strongly urged on behalf the defendants—that it relates to proceedings in a Dominion and not an Ontario Court, does not denude it of that character: *Strange v. Brennan* (1846), 15 Sim. 346.

The defendants' appeal should therefore be dismissed.

Then the state of the case being that the agreement and the release set up by the defendants were out of the question, I confess I am unable to see how the taxing officer could have come to any other conclusion than he did with regard to the plaintiff's right to delivery and taxation of a bill of costs, charges and disbursements.

Putting aside for the present the fact that the defendants had demonstrated the practicability of making up a bill of items by delivering a bill of costs in pursuance of the judgment, and that it stood referred to the taxing officer with the other matters in the action, what was the defendants' position before the taxing officer?

But for the agreement and release, the plaintiff need not have resorted to an action at all. She could have availed herself of the provisions of section 39 of the Solicitors' Act then in force, viz.: R. S. O. (1887), ch. 147, (now R. S. O. ch. 174), and applied for an order for delivery of a bill, and, upon delivery, for taxation thereof under section 32, *et seq.*, of the same Act.

The defendants, as solicitors practising in Ontario, are subject to the provisions of that Act; and the work and

services performed by them for the plaintiff, though done and performed in the Exchequer Court, were none the less done by them in their capacity of Ontario solicitors. It was "business done by a solicitor as such" within the meaning of section 31 of the Act.

Judgment.

Moss,
J.A.

By section 17 of the Exchequer Court Act, R. S. C. ch. 135, the defendants are authorized by reason of their being solicitors in this Province to practise as solicitors in the Exchequer Court, and by section 18 they are officers of that Court.

But that does not alter their status as solicitors in Ontario, nor deprive the Courts of the Province of jurisdiction over them, even in respect of business done by them in the Exchequer Court. I think there is much in the opinions of some of the learned Judges of the Supreme Court in *The Queen v. Doutre* (1882), 6 S. C. R. 342, and of Lord Watson in 9 App. Cas. 745, which supports this view.

The Exchequer Court has apparently adhered to the view taken by the Judges of the Supreme Court of Canada at its organization, as stated by the Chief Justice in *Boak v. Merchants' Marine Insurance Co.*, Cassels's Dig. 677, and has not deemed it advisable to provide a tariff of costs between solicitor and client. But even if there was such a tariff, I think that would not oust the jurisdiction of the Courts of Ontario under the Solicitors' Act.

A somewhat similar question arose in England with reference to fees and charges claimed by a solicitor in respect of services rendered as a parliamentary agent, attorney and solicitor. The Imperial Act, 10 & 11 Vict. ch. 69, made provision for the delivery of bills of costs, charges and expenses, in respect of any proceedings in the House of Commons in relation to any private bill and any other matters, and for their taxation in a special way before a special officer and according to a special tariff of allowances. A solicitor who had acted for a company in obtaining an Act of Parliament, for enlarging its powers and extending its objects, rendered his bill of costs in relation thereto.

Judgment.

Moss,
J.A.

After the expiration of twelve months from the delivery of the bill, a petition was presented in Chancery under the provisions of the 6 & 7 Vict. ch. 73, corresponding to our Solicitors' Act, praying for a reference for taxation of the bill, alleging special circumstances as required by section 37.

In opposing the petition, Mr. Wickens for the solicitor, amongst other things, urged that it was an open question whether, since the 10 & 11 Vict. ch. 69, the Court had jurisdiction to order a reference for taxation of a bill like the one in question. But Vice-Chancellor Sir W. Page Wood, said: "I have no doubt as to the jurisdiction," and in the result he ordered a reference for taxation: *In re Strother* (1857), 3 K. & J. 518.

If there is jurisdiction to order taxation, there is also jurisdiction to order delivery of a bill (R. S. O. ch. 174, sec. 42), which, however, would be taxed having regard to the nature and value of the services rendered and business done, and the scale of allowances between party and party so far as applicable: *Bossé v. Paradis* (1892), 21 S. C. R. 419; *In re Sudlow* (1849), 11 Beav. 400.

All the business done for which the defendants claim compensation was business in which they were employed because they were solicitors, and in which they would not have been employed if they had not been solicitors, or if the relation of solicitor and client had not subsisted between them and the plaintiff. By virtue of this relation and employment they obtained the sum of \$6,000 for the plaintiff.

In the case *In re Aitken* (1820), 4 B. & Ald. 47, Abbott, C.J., said: "Where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, there the Court will exercise this jurisdiction." See also *In re Richardson* (1870), 3 Ch. Ch. 144; *In re Barker* (1834), 6 Sim. 476.

Here no prejudice or inconvenience can arise from inability to make up a bill shewing the nature and particulars of the business done and the services rendered. And there is in the Exchequer Court a tariff of fees and charges between party and party which is a criterion by which the taxing officer may be guided to some extent and an officer (the Registrar) to whom, if necessary, he could apply for advice: Exchequer Court Rules No. 229; Audette's Practice, p. 297. This probably displaces the objection raised by the Court in *Williams v. Odell* (1817), 4 Price 279. At the date of that decision there was apparently no provision for allowances for costs in the House of Lords. This was changed by the Standing Order No. 215, passed on the 3rd of April, 1835: Macqueen's Practice, p. 266, and Appendix No. 1, p. 781.

Judgment.

Moss,
J.A.

There is the further difficulty in the defendants' way, that upon the record as it now is, divested of the defences of the agreement and release, they are obliged to set up their claim for compensation by way of set-off to the plaintiff's claim, and they are subject to be required to give such proper particulars of the nature and items of their set-off as may be necessary to enable it to be properly dealt with, and they must establish their claim by proper proof, either bringing the work within the items of a tariff or shewing its value.

Whether the particulars so delivered be called a bill and the proceedings to prove the items be called a taxation or by some other name, seems to be of no substantial importance.

The real question is, what sum are the defendants entitled to for the business done and services rendered by them as solicitors for the plaintiff?

It is to be observed, however, that the proceeding to ascertain the sum due a solicitor under the Solicitors' Act is therein invariably termed a taxation wholly irrespective of the nature of the business done by the solicitor.

In my opinion the ruling of the taxing officer ought not to have been disturbed, and the plaintiff's appeal should

Judgment. be allowed with costs, and the order of Meredith, J.,
Moss, restored, with costs to the plaintiff of the appeal to the
J.A. Divisional Court.

LISTER, J. A. :—

I agree in the judgment just read.

*Appeal allowed, OSLER, J. A., dissenting,
and cross-appeal dismissed.*

R. S. C.

MINHINNICK v. JOLLY.

Fixtures—Sale—Severance.

Statement. AN appeal by the plaintiff from the judgment of a Divisional Court, reported 29 O. R. 238, was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 27th of January, 1899, and was dismissed with costs, the Court agreeing with the judgment below.

Robinson, Q.C., and J. P. Moore, for the appellant.

Aylesworth, Q.C., for the respondent.

R. S. C.

FOLEY V. TOWNSHIP OF EAST FLAMBOROUGH.

Municipal Corporations—Damages—Highway—Want of Repair—Negligence of Driver.

A highway, in an old and thickly settled district, over which there is much traffic, is out of repair within the meaning of the statute when a large stump is allowed to stand in the highway just at the edge of the travelled way, MACLENNAN, J.A., dissenting.

Semble: Where horses are running away without any fault of the driver, and while he is still endeavouring to recover control of them he sustains injury owing to such a defect in the highway, he is entitled to damages. The contributory negligence of the driver of the vehicle in such a case is not an answer to an action for injuries sustained by an occupant thereof, who has in good faith entrusted himself to the driver's care. Judgment of a Divisional Court, 29 O. R. 139, reversed.

THIS was an appeal by the plaintiffs from the judgment Statement. of a Divisional Court [ARMOUR, C.J., and STREET, J.], reported 29 O. R. 139, and was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 23rd of September, 1898. The facts and the authorities relied on are stated in the report below, and in the judgments in this Court.

George Lynch-Staunton, for the appellants.

W. T. Evans, for the respondents.

January 24th, 1899. OSLER, J. A. :—

The learned trial Judge was evidently of opinion that the defendants' road at the place where the accident in question happened was negligently out of repair, as he says that the whole case turns on the question whether the driving was negligent, and he rests his judgment expressly on the ground that the unfortunate deceased man Foley was negligent in entrusting himself to the care of a drunken driver, whose fault it was that the horses ran away, and upset the waggon in which they were sitting, against the stump in the road.

He held, therefore, that the plaintiffs, the wife and children of the deceased, suing under the Fatal Accidents Act,

Judgment.
OSLER,
J.A.

R. S. O. ch. 166, could not recover against the township as for an injury caused by the negligence of the latter in leaving the road in a condition of disrepair or improper or insufficient repair. The judgment of the Divisional Court is put upon an entirely different ground. It is assumed that the driver in spite of ordinary care on his part lost control of his horses, and that, the horses running away, the injury was caused by their running the waggon against the stump on the highway, which, notwithstanding the existence of the stump there, was in a reasonable state of repair for ordinary travel. In other words, the plaintiffs failed in the Divisional Court because the road was not shewn to have been out of repair, and, therefore, that negligence on the defendants' part had not been proved. But the Court also express the opinion that but for the decision of the Court of Queen's Bench in *Sherwood v. City of Hamilton* (1875), 37 U. C. R. 410, they would have held that the running away of the horses and their ceasing to be under the control of the driver was the proximate cause of the injury, and that, therefore, the defendants would not be liable even if it could have been said that the road was not in a reasonable state of repair at the place where the injury occurred.

The two questions involved in this appeal appear to be :

1. Whether the road at the place in question, having regard to all the circumstances, was in a reasonable state of repair for ordinary travel.

2. Whether the case was properly disposed of at the trial on the ground of the deceased having negligently entrusted himself to the care of an incompetent driver.

On the first question I must say that the evidence strikes me as admitting of but one conclusion, namely, that the road was not in a reasonable state of repair.

To use the language of the late Chief Justice Richards in *Toms v. Township of Whitby* (1874), 35 U. C. R. 195, at p. 225 : " If the township had only been recently settled, the population sparse, and the highway but recently opened and but seldom travelled, it would not be reason-

able to expect as complete and well appointed a [road] as in a thickly peopled township and in a public highway much used."

Judgment.

OSLER,
J.A.

This is an old road which has been travelled for the past fifty years or more and is part of the main highway leading through the township from Hamilton to the town of Galt. The country surrounding it has long been settled and there are villages along its route. It appears to be a gravelled highway, a circumstance which itself indicates that the township is able to spend money in keeping it up, and it is maintained out of the township funds and not by statute labour. At the *locus in quo* an ancient stump has been left at the very edge of the travelled part of the road, the roots of which have been partly cut away or levelled so as not to project above the surface of the travelled way. Having regard to the width of the road between the fences and the width of the travelled way, and its alignment in reference to the position of the stump, the existence of the latter is a manifest danger and is quite as much evidence of the road not being in a proper state of repair as was the ditch by the side of the highway in *Walton v. County of York* (1881), 6 A. R. 181. The question is no doubt one of fact, but the nature of the evidence is such that we are not precluded from forming an independent opinion upon it, and I agree rather with what seems to have been the opinion of the trial Judge on this point than with that of the Divisional Court.

I do not regard the fact that the horses were running away at the time of the accident as by any means a conclusive answer to the plaintiffs' right to recover. Their driver was still endeavouring to control them, and both he and the deceased were travellers on the highway. It may well be that Sullivan could not recover if it was his fault that the horses were not under control, but assuming that he was not negligent and was suing for his own loss, the question would be whether that loss would have been sustained but for the defect in the way. I think *Sherwood v. City of Hamilton* (1875), 37 U. C. R. 410, a well decided case

Judgment.

OSLER,
J.A.

and it as well as *Toms v. Township of Whitby* (1875), in the same volume, in appeal, p. 100, support that conclusion. So long as the driver is trying to manage and recover control of his horses which are carrying him over the road, I think he has the right to complain if by reason of a defect in the road he sustains an injury while he is in that situation. I do not see that it matters that he lost control over his horses for one minute or for five, or why the existence of the defect may not properly be held to be the proximate cause in the one case quite as much as in the other. In both it was a natural and probable result of the defendants' neglect to repair the road that such an accident should happen at the place in question, whether at the moment of passing it the horses were under control or not. I refer also to *Town of Prescott v. Connell* (1893), 22 S. C. R. 147, and *Engelhart v. Farrant*, [1897] 1 Q. B. 240, in support of the proposition that the defect in the road was the proximate cause, or "an effective cause," of the accident; in other words "a cause of which the accident was a sufficiently natural and to be looked for consequence."

See also Elliott on Roads and Streets (1890), p. 449; *McKelvin v. City of London* (1892), 22 O. R. 70. Such cases as *Steinhoff v. County of Kent* (1887), 14 A. R. 12, where in the absence of a driver the plaintiff's horses escaped from private premises out upon the public road, and *Price v. Cataraqui Bridge Co.* (1874), 35 U. C. R. 314, where the driver was thrown out of his carriage and the horses continued their course along the road, running, as they also did in the former case, into an open draw-bridge, are quite inapposite. Under such circumstances the road cannot be said to be used for the purpose of travel.

There remains the question how far Foley or the plaintiffs are affected by the negligence of Sullivan, the driver of the team. If Foley was free from fault the decision in the recent case of *Mills v. Armstrong* (1888), 13 App. Cas. 1, shews that he would not be affected by Sullivan's negligence unless *that alone* was the cause of the accident: *Mathews v. London Street Tramways Co.* (1888), 60 L. T.

N. S. 47; *Little v. Hackett* (1886), 116 U. S. 366. Nor does it seem important that the person injured was not a passenger in a public conveyance, but one who is, as Lord Bramwell expresses it (13 App. Cas., at p. 13), "given a lift gratis" by the driver of the vehicle: *Dyer v. Erie R. W. Co.* (1877), 71 N. Y. 228; *Carlisle v. Brisbane* (1886), 57 Am. R. 483, 488, 113 Pa. St. 544. See also *Nesbit v. Garner* (1888), 1 L. R. Ann. 152; *Dean v. Pennsylvania R. W. Co.* (1889), 6 *ib.* 143; *Becke v. Missouri Pacific R. W. Co.* (1890), 9 *ib.* 157; *Union Pacific R. W. Co. v. Lapsley* (1892), 16 *ib.* 800.

Judgment.

OSLER,
J. A.

On the other hand, as is well observed in the last edition of Shearman and Redfield on Negligence, 5th ed., p. 100: "No one can be allowed to shut his eyes to danger, in blind reliance upon the unaided care of another, without assuming the consequences of the omission (to take care to avoid injury). And one who needlessly entrusts himself to the control of one whom he knows to be incompetent, contributes thereby, in some degree, to injuries which result from such incompetency"; *Hershey v. Road Commissioners of Mill-creek* (1887), 9 Atl. Rep. 452; and see Beach on Contributory Negligence, 2nd ed., sec. 115; Jones on Negligence of Municipal Corporations, sec. 224.

Whether, therefore, Foley was drunk at the time in question or whether he was sober, if he deliberately entrusted himself, as in either of those contingencies it might well have been found that he did, to the care of a drunken driver, or person incompetent by reason of his own intoxication to manage the horses, I think he could not recover—at all events the trial Judge might properly so hold if he came to that conclusion. But there is some evidence that the condition in which Foley was when he was lifted into the waggon was not owing to intoxication but to a fall which he sustained in the yard of the inn, in which he struck his head upon some stones, which, for a time at least, reduced him to the dazed or half unconscious condition in which he seems to have been when lifted or helped into the waggon, so that he was not then in a situation to

Judgment.

OSLER,
J.A.

recognize the danger of entrusting himself to Sullivan's care. That is a view of the evidence which was not considered at the trial; and if it had been adopted, I think it might well have been held that there was no such negligence imputable to him as to disentitle him to recover. On the whole, it appears to me that on this point there should be a new trial as the nature of the case is such as to make it desirable that the tribunal which disposes of the facts should see and hear the witnesses. Costs of the last trial to abide the event; plaintiffs to have the costs of the appeal.

LISTER, J. A. :—

Action by the widow and children of John Foley deceased, under the Fatal Accidents Act, R. S. O. ch. 166, to recover damages occasioned by his death, caused, as it is alleged, through or by reason of a defect in, or want of repair of, a certain highway known as the "Centre Road," which it was the statutory duty of the defendants to keep in repair.

The defect or want of repair complained of was a stump from two and a half to three feet high standing in the margin of the travelled way from eight to ten feet from the centre thereof, and which from its appearance had stood there for many years. On the night of the 3rd of December, 1896, while Foley was being driven along the road in question the horses ran away and the left front wheel of the waggon struck the stump and Foley was thrown from the waggon upon the road causing injuries from the effect of which it is alleged he died. The waggon in which he was driving and the team by which it was drawn belonged to and were being driven by a man named Sullivan, Foley having no control over the team or its movements or over the driver.

The Chancellor, who tried the case without a jury, dismissed the action on the ground that Foley was guilty of negligence in allowing himself to be driven or taken

care of by Sullivan, who, he found, was drunk and unfit to drive, and whose recklessness was the cause of the accident. He made no finding as to whether the stump, situated as it was, was a defect or obstruction to the safe use of the road.

On appeal to the Divisional Court the judgment was affirmed, not upon the ground of Foley's negligence, but upon the ground that the road at the time and place of the accident was in a reasonable state of repair, fit for ordinary travel.

The trial Judge having found upon the question of contributory negligence only, it may be assumed that his opinion as to the state of repair of the road is not in accord with that of the Divisional Court.

It appeared in evidence that the roots of the stump which at one time projected above the ground and extended towards the gravelled way, had been cut down even with the road ; that there was no grass between the stump and the gravelled way, and that the tracks of wheels came up close to the stump, which was, as a witness described it, "on the very edge of the road."

There was also evidence to shew that the defendant corporation had been settled for many years, and was thickly settled ; that the road in question is gravelled and a main highway much travelled, passing through the most populous portion of the township. The road is said to have been travelled for the past forty or fifty years.

Municipal corporations are bound under the statute to keep their highways in repair, and if they fail to discharge this duty, any person who suffers damage and is free from fault can maintain an action against the municipality for damages sustained by reason of its neglect of duty.

There is no absolute legal test as to the sufficiency of a highway. The sufficiency of a particular highway is always a question of fact to be determined in the light of the peculiar and particular conditions and circumstances of each case.

Patterson, J.A., in *Lucas v. Township of Moore* (1879),

Judgment.

LISTER,
J.A.

Judgment.

LISTER,
J.A.

3 A. R. 602, at p. 608, says: "It is now well settled by decisions in our own Courts, as well as in the New England States and in the State of New York upon statutes framed in similar terms, that the obligation expressed by the general phrase 'keep in repair'—a phrase which is applied equally to an allowance for road in a newly surveyed and organized township, and to a crowded street in the business part of a city—is satisfied by keeping the road in such a state as is reasonably safe and sufficient for the requirements of the particular locality, and that in deciding whether any municipal council is chargeable with default, regard must be had to such considerations as the means at the command of the council, and the nature of the ordinary traffic of the locality." See also *O'Connor v. Township of Otonabee* (1874), 35 U. C. R. 73; *Hutton v. Town of Windsor* (1874), 34 U. C. R. 487.

It was strongly argued by counsel for defendants that the stump did not constitute a defect or want of repair within the meaning of the statute, and therefore there was no obligation on the defendants to remove it, or to protect persons using the road from injury by reason of it.

No case has been cited precisely similar to the present case in its facts, but I think, applying the principle of many cases decided in our own Courts, as well as in those States having statutes similar to our own, the contention of the defendants cannot be sustained. Thus in *Toms v. Township of Whitby* (1874), 35 U. C. R. 195, it was held to be the duty of the defendants to fence or guard the embankment. Wilson, J., in delivering judgment, says (p. 208): "I am of opinion, under the enactments referred to in the Municipal Act, that the defendants were bound, as a matter of duty, to fence, guard, or otherwise secure the place of the accident, if it were, as it was found to have been, dangerous to those who were using the road, in order to prevent accident or injury happening from the want of a necessary protection." And again he says: "It is reasonable the public should be protected from all danger on the highways, if possible, by due repairs, or by other proper means, but, at

any rate, from all danger which is very great, or which may happen to persons using ordinary care on the highway, or which can be provided for at a reasonably small expense." See also *Sherwood v. City of Hamilton* (1875), 37 U. C. R. 410. And it seems equally clear that this duty extends to the removal or guarding of obstructions on or so near the travelled way as to be dangerous and liable to result in injury to travellers: *Castor v. Township of Uxbridge* (1876), 39 U.C.R. 113, at p. 125; *McKelvin v. City of London* (1892), 22 O. R. 70; *Davis v. Curling* (1845), 8 Q. B. 286; *Foreman v. Mayor of Canterbury* (1871), L. R. 6 Q. B. 214; *Drew v. Sutton* (1882), 45 Am. Rep. 644; *Lucas v. Township of Moore* (1878), 43 U. C. R. 334, at p. 340; Thompson on Negligence, p. 770.

Judgment.

 LISTER,
J.A.

It may be conceded that country roads in this Province cannot for various reasons be made perfectly safe. But, in my opinion, the public have a right to be protected against excavations or obstructions on or near the travelled way, which render the road unsafe for travellers using it.

Any object in, upon, or near by, the travelled path which might necessarily obstruct or hinder one in the use of the road for the purpose of travelling thereon, and which from its nature and position would be likely to produce injury, is, in my opinion, a defect or want of repair within the statute.

Applying the rule to the circumstances of the present case, it seems clear that the road at the time and place of the accident, by reason of the stump, was not in such a state of repair as to be reasonably safe and sufficient for the ordinary travel of the locality, and that the defendants neglected to discharge their statutory duty in permitting the stump to remain there. It follows, therefore, that the plaintiffs are entitled to maintain this action, unless Foley's negligence contributed to the injury complained of. I think the evidence fails to establish that Foley was intoxicated on the night in question, and I shall assume in dealing with this branch of the case that he was sober. The negligence charged is that Foley allowed himself to be

Judgment.

LISTER,
J.A.

taken care of by a drunken man. It was proved that Foley, before being lifted or helped into Sullivan's waggon, fell and struck his head against a stone; that he was lifted up by two men and lifted or helped into Sullivan's waggon; that nothing was said to or by Foley. The evidence does not shew that he was conscious when lifted into the waggon. The learned trial Judge in his judgment says: "Now, I don't know whether Foley was drunk or sober, or whether he slipped and fell and hurt himself in falling, or whether he was lifted into that waggon in an unconscious condition. Helped in he certainly was, and probably he could not take any steps to protect himself. * * I don't know whether the deceased Foley got all his hurts at this place or not; whether he was injured in falling down in the yard at the inn or not; but it seems to me the whole case shews utter want of care on the part of both Foley and Sullivan. Foley had no business to get in there; he had no business to allow himself to be taken care of by a drunken man; and Sullivan drove in this reckless way, and the end was disaster. I think they have themselves to blame."

Without a specific finding that Foley freely and voluntarily entrusted himself to be driven by Sullivan, whom he knew, or ought to have known, to be incompetent to drive the team by reason of his intoxication, the judgment cannot be supported. If, under these circumstances, Foley thought proper to entrust himself in the waggon with Sullivan, he must be taken to have assumed all the risks of Sullivan's recklessness: *Hershey v. Road Commissioners of Millcreek* (1887), 9 Atl. Rep. 452; *Shearman and Redfield on Negligence*, 5th ed., sec. 66a, and cases there cited.

But if, by reason of the injury received from the fall in the yard, he was, when lifted into the waggon, unconscious or so dazed as to be unable to appreciate the danger and risk which would be incurred by accompanying Sullivan, he cannot be charged with negligence.

The defendants plead that Foley had entrusted himself to be driven by Sullivan, and that it was owing to the

negligence, etc., of Sullivan that the vehicle came in contact with the stump. Judgment.

Upon the finding of the learned trial Judge this, prior to the judgment in *Mills v. Armstrong* (1888), 13 App. Cas. 1, overruling *Thorogood v. Bryan* (1849), 8 C. B. 115, would have been a complete answer to the action. But since *Mills v. Armstrong* it is perfectly well settled that the negligence of a driver of a vehicle will not be imputed to the person driving with him, if such person is free from fault, and has no control over the driver: *The Bernina* (1887) 12 P. D. 58; *Nesbit v. Garner* (1888), 1 L. R. Ann. 152; *Carlisle v. Brisbane* (1886), 57 Am. R. 483, 113 Pa. St. 544.

There is no pretence that Foley had any control over Sullivan.

I think that there should be a new trial, costs to abide the event.

BURTON, C. J. O.:—

I think the question of whether Foley was or was not conscious at the time when he was assisted into the vehicle should have been submitted to the jury, and that the case should go back for a new trial.

MOSS, J. A.:—

Concurred in the result.

MACLENNAN, J. A.:—

Thought the appeal should be dismissed, agreeing with the judgment of the Divisional Court.

Appeal allowed, MACLENNAN, J.A., dissenting.

RIELLE V. REID.

Fraudulent Conveyance—Company—Fictitious Incorporation—Election of Remedies.

When a limited liability company has been regularly formed in accordance with the Ontario Companies Act, for the purpose of taking over and carrying on the business of a trader who is insolvent, the conveyance of the assets of the latter to the company, though it may be open to attack on the ground that it is fraudulent and void as against creditors under the Statute of Elizabeth or the Assignments and Preferences Act, cannot be set aside at the instance of his creditors on the principle of the company being merely his *alias* or agent.

Salomon v. Salomon, [1897] A. C. 22, applied.

A creditor cannot take the benefit of the consideration for a conveyance and at the same time attack the conveyance as fraudulent, and therefore where creditors seized shares in a company allotted to their debtor in consideration of the conveyance by him of his assets to the company it was held that they could not attack the conveyance.

Wood v. Reesor (1895), 22 A. R. 57, applied.

Judgment of FALCONBRIDGE, J., 28 O. R. 497, reversed.

Statement.

THIS was an appeal by the liquidator of the defendant company, and by the defendant Minnie Reid, from the judgment of FALCONBRIDGE, J., reported 28 O. R. 497, and was argued before OSLER, MACLENNAN, and LISTER, JJ. A., on the 17th, 18th and 21st of November, 1898. The facts are stated in the report below and in the judgment in this Court.

Emerson Coatsworth, for the appellant, the liquidator.

F. E. Hodgins, for the appellant, Minnie Reid.

S. H. Blake, Q. C., and *T. C. Thomson*, for the respondent.

January 24th, 1899. The judgment of the Court was delivered by

OSLER, J. A. :—

This was an action brought by the plaintiffs as creditors of the defendant J. B. Reid, against that defendant, his wife, Minnie Reid, and the Reid Company (Limited). The statement of claim in substance sets forth that in the summer of the year 1894, the defendant Reid being then

indebted to the plaintiffs as executors of one T. M. Thomson deceased, upon the covenants contained in two freehold mortgages, in a very large sum for which the mortgaged property was an insufficient security, and with intent to hinder and delay or defeat the plaintiffs in the recovery of their debt, conceived the idea of converting the business which he was then carrying on into a limited company, under the provisions of the Ontario Joint Stock Company's Letters Patent Act; that letters patent creating the defendant company were issued on the 4th of August, 1894, the applicants therefor being the defendant, his wife, R. M. Cherry, the foreman of his lumber yard, J. A. Loughheed, his bookkeeper, and E. Coatsworth, his solicitor, who were by the letters patent declared to be the first directors of the company, the capital of which was \$50,000, divided into 500 shares of \$100 each, allotted by the charter thus: Reid, 247; his wife, 250, and the others one share each; that on the 1st of September, 1894, Reid assigned and conveyed to the company all the assets and property of his business, and the premises in which it was carried on, and was appointed manager of the company for a term of five years at a salary of \$3,000 per annum; that the company transferred to Reid 70 paid-up shares in part payment of the price of the property conveyed to them, and also other shares partly paid-up; that the 70 paid-up shares were transferred by Reid to his wife, without consideration, and that the balance of his holding was pledged to the company as security for the faithful performance of his duty as manager; that Reid and his wife had thus become the holders, the one of 427 and the other of 70 shares in the capital stock of the company. Then it is charged that the conveyance of the 1st of September and the subsequent transfer of the stock were part of a fraudulent scheme or device to hinder and defeat or delay the plaintiffs in the recovery of their debt, and to prevent the stock from being seized and taken in execution; that Minnie Reid and the other directors and shareholders were mere nominees of and trustees for the debtor; that the company was and had

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always been, his mere agent or *alias*, and should be so declared, and that it was formed in order to carry out the fraudulent purpose charged.

The relief claimed is: (1) That the company be declared to be merely an *alias* or trustee of Reid, and that all its assets be declared liable for payment of his debts; (2) that all transfers or conveyances or declarations of trust made to or in favour of the company be set aside and declared fraudulent and void as against his creditors; (3) that in the event of the creditors' claims not being paid the company may be wound up by the Court under the provisions of the Winding-up Act; (4) that a receiver may be appointed of the estates both of Reid and the company; and (5) that the defendant Minnie Reid be declared a trustee of the defendant J. B. Reid, of all such shares or interest as she holds in the company by virtue of the shares now standing in her name.

The statement of defence enters very fully into the details of the mortgage transactions between the testator and the plaintiffs and the defendant Reid and his former partner; denies all charges of fraud and fraudulent intent; insists upon the *bona fides* of the constitution of the company and of its objects; pleads that the conveyances of the 1st of September were made for valuable consideration and in good faith, and that the paid-up stock of the defendant J. B. Reid was fully paid up as part of the price of the property transferred to the company. The defendant company denied that they were the *alias* of or trustees for Reid; alleged that they had been in active operation as a going concern for nearly two years; that the old liabilities of Reid & Company had been paid off and new ones incurred, and that the creditors of the company who were not represented had an interest in the relief sought.

The case was tried before FALCONBRIDGE, J., on the 26th, 30th and 31st of October, 1896, and the 1st, 2nd and 3rd of March, 1897. Evidence was given at great length as to Reid's financial condition at the dates of the mortgages

and of the formation of the defendant company, and as to the value of the mortgaged securities, which the defendants contended was ample enough to deprive the plaintiffs of their status as creditors within the Statute of Elizabeth. It was also urged that as the result of certain dealings between the parties the judgment which the plaintiffs had recovered upon the covenant in the earliest of the two mortgages had been discharged.

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It was found that the defendant company had been regularly formed under the provisions of the Joint Stock Company's Letters Patent Act, with a capital of \$50,000, divided into 500 shares of \$100 each, and that the first stockholders and directors were the defendants Reid and his wife, and the other three persons already mentioned; that within a few weeks after its formation an arrangement was entered into between the company and Reid, by which the latter transferred to them at a valuation the whole of his business, assets and premises. The company assumed the debts and liabilities of the business, and Reid acquired 497 shares of the stock, of which 70 were issued to him as paid-up shares on account of the purchase money, and the residue were taken in the same way as partly paid up. Not long afterwards the 70 shares were transferred by Reid to his wife in consideration of an advance of \$2,000 procured for the company upon certain policies of insurance which Reid had declared in her favour.

It was also proved that the company had carried on the business thus acquired from Reid; that it had discharged the then outstanding liabilities of the Reid business, and had incurred new ones to creditors of its own; that the property and assets assigned to them by Reid had all, with a very trifling exception, been sold and disposed of or destroyed in a fire which had occurred on the premises, and that new stock had been brought in. Lastly it was proved that after the plaintiffs had become aware of the formation of the company and of the extent and character of Reid's holding of shares therein, they had directed the sheriff to levy upon his interest in the shares under the

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execution then in his hands. That this had accordingly been done, and that the sale had been duly advertised and adjourned from time to time for want of buyers, and that they were still under seizure at the time of the trial, the sale having been indefinitely postponed.

By the judgment of the learned trial Judge, which was pronounced on the 6th of May, though the details were not finally settled until the 8th of June, 1897, when it was actually signed, it was declared: (1) That the defendant company were, and had been since their incorporation, the agents of the defendant J. B. Reid; (2) that all the conveyances and transfers made by defendant Reid to the company or to a trustee therefor of all the property real and personal in the pleadings mentioned were and are fraudulent and void as against the plaintiffs and the other creditors of the said J. B. Reid, and that all of the assets of the company are part of the assets of J. B. Reid, and liable for the satisfaction of the claims of the plaintiffs and others, his creditors, subject to the claims of *bonâ fide* creditors (if any) of the company incurred since its incorporation; (3) a receiver was appointed to get in the outstanding debts of the business carried on by the Reid Company, and to receive all the stock-in-trade and assets; and (4) after certain details not necessary to be mentioned it is directed that in default of payment of creditors' claims, the property is to be sold and the proceeds applied (1) to paying the plaintiffs' costs as between party and party or so much thereof as may not be personally paid by Reid and the Reid Company; (2) in payment of what shall be found due to the plaintiffs and other encumbrances and creditors. The plaintiffs' costs as between solicitor and client are directed to be taxed and paid out of the shares of the plaintiffs and the other encumbrances and creditors in proportion to the amount of such shares as realized for them under the judgment. The defendants, except Minnie Reid, are ordered to pay the costs of the action, and as between her and the plaintiffs no costs are awarded.

In the interval between the delivery and signing of the

judgment the defendant company was placed in liquidation. The receiver in the action was appointed liquidator, and leave was afterwards given to him to bring this appeal.

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OSLER,
J.A.

It appears to me that in launching this action the plaintiffs had no very clear idea of what relief they were entitled to, as they claim not only the property which is said to have been transferred in fraud of creditors, but also the consideration which the fraudulent debtor received from the grantee therefor. These are inconsistent positions. If they claim the shares they must allow that the property for which they were given is not liable to satisfy their judgment. Nevertheless the judgment in the present action appears to give the plaintiffs the relief they ask in both respects. As regards the defendant company the pleader seems not to have been quite certain whether it should be treated as an entity—a real company—or as a mere name for J. B. Reid and it is evident that the action was brought in reliance upon the then recent decision of the Court of Appeal in the case of *Broderip v. Salomon*, [1895] 2 Ch. 323. The judgment of the House of Lords reversing that decision was known at the trial, but the learned Judge endeavoured to distinguish it on the ground that the company there in question, although, like the present, what has been described as a one man company, was promoted by a solvent trader, whereas in this instance its promoter, Reid, was in financial difficulties, though not expressly found to have been insolvent. We must also assume that the learned Judge has found that one object of Reid in procuring it to be incorporated was to delay and hinder his creditors, by the transfer thereto, after its formation, of the property of its founder. The case of *In re Carey*, [1895] 2 Q. B. 624, a decision by the same learned Judge who decided *Broderip v. Salomon* in the first instance, was relied upon, but the principle of both decisions was clearly rejected by the House of Lords when reversing the judgment of the Court of Appeal in the second case. The company was regularly formed, all the requirements of the Act were com-

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plied with necessary to bring it into existence, and it then became a distinct legal entity, a validly constituted corporation, the rights and liabilities of which were not capable, as the judgment of the House of Lords shews, of being dealt with on the principle that it was an agent or *alias* of J. B. Reid. A passage in the judgment of the Chancellor places this in a very clear light. He says (*Salomon v. Salomon & Co.*, [1897] A. C. 22): "It seems to me to be essential to the artificial creation that the law should recognize only that artificial existence—quite apart from the motives or conduct of individual corporators." Then after pointing out that if a fraud had been committed upon the officer entrusted with the duty of giving the certificate of incorporation it might perhaps be shewn by some proceeding in the nature of *scire facias* that the company had no real legal existence, he adds: "But short of such proof it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."

In the face of this decision and of the fact that the company had for nearly two years after its incorporation been carrying on business, incurring debts and liabilities, and acquiring assets of its own, it became impossible to support a judgment which declares that it is merely the agent of J. B. Reid, and that all its assets are part of his assets and liable for the satisfaction of the claims of the plaintiffs and his other creditors. The plaintiffs were accordingly obliged to concede, on the argument of this appeal, that the company was a real one, and to shape their case accordingly.

Taking the fact to be as the learned Judge has found, principally, I think, on the evidence of Mr. Strathy as to Reid's admission that the company was formed or intended to be formed in order to prevent his mortgagees from

pressing him, it is manifest that the highest ground on which the plaintiffs' case can be placed is that the conveyances impeached are fraudulent as against creditors under the Statute of Elizabeth. It was not suggested that they fell within the Assignments and Preferences Act, R. S. O. ch. 147. The case of *Re Hirth* (1898), 80 L. T. N. S. 63, turns upon the provisions of the Bankruptcy Act, 1883.

In the view I take of the case, I do not think it necessary to decide whether the learned Judge's finding of fact can be supported. We had the advantage of a very full discussion of the evidence, and apart from Mr. Strathy's recollection of a conversation between himself and J. B. Reid on the subject of the formation of the company, which the learned Judge seems to have accepted, the impression I have derived from the argument and a subsequent perusal of the evidence, is that the company was promoted for legitimate business reasons.

There may be a difficulty in a case like this in proving that the company had notice of the fraud, but it is unnecessary to consider this point, because in my opinion it is not open to the plaintiffs to attack the conveyances of the 1st of September after having levied their execution upon the shares which Reid received as part of the consideration. These, as I have already said, were seized under their *fi. fa.* and offered for sale, and though not sold for want of buyers, they remain under seizure, the sale having been indefinitely postponed. This course was deliberately taken before the action was brought and after the plaintiffs had, by the examination of Reid, ascertained the circumstances under which the company was formed and Reid's interest therein acquired. On the principle discussed and illustrated in such cases as *Miller v. Hamlin* (1882), 2 O. R. 103; *Beemer v. Oliver* (1884), 10 A. R. 656; and *Wood v. Reesor* (1895), 22 A. R. 57, the plaintiffs having elected to follow the consideration for the property conveyed to the company, cannot assert a claim to the property as well by alleging that the conveyance is fraudulent as against themselves and other creditors.

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J.A.

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J.A.

Upon another ground also the action should have been dismissed. After the conveyances to the company they carried on their business in the usual way, and the stock they acquired from Reid was sold in the ordinary course and new stock acquired, and what was not sold was destroyed in a fire which occurred on their premises. Therefore, even were these conveyances declared to be void the plaintiffs would derive no benefit from such a judgment, as the property received from the execution debtor is no longer distinguishable, nor were the proceeds received in such a way as to be earmarked or identified as derived from such property. In other words, even were the conveyances out of the way the property mentioned therein is no longer in a condition to be followed up by seizure or sale under execution: *Davis v. Wickson* (1882), 1 O.R. 369. There is a trifling exception of a small portion of the property which came into the hands of the liquidator, the appellant, as to which, had the action otherwise been maintainable, the plaintiffs might have had some relief.

As the case stands I think the proper order to be made is to allow the appeal and dismiss the action as to all the defendants with costs. It is perhaps right to add that under no circumstances could the judgment have been supported as it is at present drawn up, making the company's assets liable to the payment of the plaintiffs and Reid's other private creditors, and giving them a first charge on such assets in respect of their costs.

Appeal allowed.

R. S. C.

CASTON V. CONSOLIDATED PLATE GLASS COMPANY.

Master and Servant—Hiring Waggon—Negligence of Driver—New Trial—Adding Parties.

When a man is the general servant of one person and at the same time the servant of another person in relation to a particular matter, the question which of these two persons is liable for his negligence must be decided by ascertaining which of them was exercising control over him at the time of the negligent act or omission, and if, in an action for damages against the alleged master, there is any evidence of exercise of control, the case must go to the jury.

In this case, where the defendants had hired from another company a horse and waggon and driver at a certain rate per day, it was held by the majority of the Court that there was some evidence from which exercise of control might be inferred.

Judgment of a Divisional Court affirmed, BURTON, C. J. O., and MACLENNAN, J. A., dissenting.

A Divisional Court, in ordering a new trial in an action for damages against the alleged master on the plaintiff's application, may properly add as a party defendant a person against whom relief is then for the first time claimed in the alternative.

Judgment of a Divisional Court affirmed.

THIS was an appeal by the defendants from the judgment of a Divisional Court [BOYD, C., ROBERTSON, and MEREDITH, JJ.] Statement.

The action was brought to recover damages for injuries sustained by the plaintiff, who, on the 13th of February, 1895, was knocked down by a horse driven by, as was alleged, a person under the control of the defendants, who, besides denying negligence, contended that the driver was the servant, and subject to the control, of another company called the Cobban Manufacturing Company.

The action was tried at Toronto on the 5th of October, 1897, before MACMAHON, J., and a jury. The evidence as to control was, in effect, as follows: The defendant company, on the 3rd of October, 1893, shortly after its organization to carry on the business of dealers in plate glass, entered into an agreement with the managing director of the Cobban Manufacturing Company, that that company should supply the defendants with a horse and waggon and driver, the resolution setting out the terms of the agreement being as follows: "Moved, etc., and carried, that the

Statement. company buy a horse and express waggon for use of the Toronto business, and that till such is done, Mr. Phillips's offer to supply at \$3 per day, including driver, be accepted." After this agreement was entered into the course adopted by the Cobban Manufacturing Company was to send a horse and waggon and driver to the defendants' office each morning, and if they were needed that day the defendants would then give the driver directions as to the work to be done, while if they were not needed they were sent back to the Cobban Manufacturing Company. Different drivers and different horses were from time to time sent, but as a rule the same waggon box, which was specially built for the carriage of plate glass; and this waggon box, though it belonged to the Cobban Manufacturing Company, had on each side a brass plate with the defendants' name engraved thereon. On the day of the accident the driver and horse and waggon box (placed on runners), were required by the defendants, and delivered some plate glass at the office of a customer. It was then found that the plate glass could not be placed in position without a ladder, and the defendants' foreman told the driver to drive to a certain paint shop for a ladder, the foreman going with him, but not giving any special direction as to the route or speed. While thus on the way to the paint shop the accident happened.

On this state of facts MACMAHON, J., dismissed the action, but the Divisional Court ordered a new trial and gave the plaintiff leave to add the Cobban Manufacturing Company as a party defendant.

The defendants and that company appealed, and the appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 22nd of September, 1898.

Ritchie, Q.C., for the appellants, the Consolidated Plate Glass Company. The relationship of master and servant did not exist between these appellants and the driver;

there was a right to give general directions as to the work to be done, but no right to dictate in what way those directions should be carried out. The case falls within *Quarman v. Burnett* (1840), 6 M. & W. 499, and was rightly dismissed. *Rourke v. White Moss Colliery Co.* (1877), 2 C. P. D. 205, has been relied on, but that case has several times been distinguished, particularly in *Jones v. Corporation of Liverpool* (1885), 14 Q. B. D. 890. *Donovan v. Laing, etc., Syndicate*, [1893] 1 Q. B. 629, is also relied on, but that case is distinguishable from *Quarman v. Burnett*, which is, in fact, there approved of. See also *Johnson v. Lindsay*, [1891] A. C. 371, at p. 382; *Jones v. Scullard*, [1898] 2 Q. B. 565; Article, 42 Sol. Journal, p. 727.

Shepley, Q.C., for the appellants, the Cobban Manufacturing Company. There was no jurisdiction to add these appellants after judgment, and, even if there was jurisdiction, the order was unfair and should be set aside: Consol. Rules 192, 206; *Johnston v. Consumers' Gas Co.* (1896), 17 P. R. 297.

J. W. McCullough, and *A. F. Lobb*, for the respondent. There was jurisdiction to add the Cobban Manufacturing Company. Consol. Rule 206 is as wide as possible; "at any stage" means what it says, and this defence was not disclosed till the trial. On the merits the order for a new trial is right. There was some evidence of control by the defendants, and it was for the jury to say what weight should be given to it: Beven on Negligence, 2nd ed., pp. 703, 730, 731; Fraser on Master and Servant, 3rd ed., p. 289.

Ritchie, and *Shepley*, in reply.

January 24th, 1899. OSLER, J. A.:—

The action is for personal injuries sustained by the plaintiff in a street collision, and the question, so far as this appeal is concerned, is whether there was evidence for the jury that the person whose negligent driving, as it is said, caused the accident, was the servant of the defendants,

Judgment.

OSLER,
J.A.

whose contention is that he was not their servant, but the servant of another company called the Cobban Manufacturing Company. The learned trial Judge nonsuited the plaintiff, and the Divisional Court have granted a new trial, by the same order also giving the plaintiff leave to amend his proceedings by adding the Cobban Company as parties defendants. No reasons for judgment are reported. Both companies appeal, but so far as the latter company is concerned I see no objection to the order if the order for the new trial can be supported. It appears that both companies are manufacturers of plate glass, and some of the directors of one are also directors of the other. After the defendants had begun business a resolution was passed by their board that the company buy a horse and express waggon for use of the Toronto business, and that till such is done Mr. Phillips's offer to supply at \$3.00 per day, including driver, be accepted. Phillips was a director of both companies, and the offer proved was to furnish a horse and waggon and driver to the defendants for the purpose of delivering their goods. The horse and waggon, thereafter furnished, were the property of the Cobban Company and the driver was their own hired servant. Sometimes one person would be sent as driver and sometimes another, and when not engaged in delivering goods for the defendants he would be sent back to the Cobban Company's premises. The defendants were to pay \$3.00 to the Cobban Company, but they had no control over the driver beyond telling him where to deliver the goods. Now upon these facts, were they the only facts to be considered, the case is not easily to be distinguished from *Quarman v. Burnett* (1840), 6 M. & W. 499, a case which Lord Watson in *Mills v. Armstrong* (1888), 13 App. Cas. at p. 17, describes as a sound and authoritative precedent, and which has frequently been approved of elsewhere in the House of Lords and in the Court of Appeal, and never, that I am aware of, questioned until in the recent case of *Jones v. Scullard* (1898), as reported in 79 L. T. N. S. 386, Lord Russell, C.J., expressed his dissatisfaction with it. Subject to what I

shall presently refer to, the case falls quite within the principle of *Quarman v. Burnett*, and the driver, although engaged in doing for the defendants what the Cobban Company had lent him to do, was, nevertheless, the servant of the latter company and not of the defendants. Upon this principle the learned trial Judge no doubt acted in non-suiting the plaintiff, and as the case seems to have been presented to him I cannot say that he was wrong, unless indeed I were prepared to hold, which, as at present advised, I am not, that the fact of the servant having been engaged in carrying and delivering goods instead of driving the hirer of the horse and vehicle, makes a difference which would warrant a jury in inferring that he was acting not as the servant of his own employer, but of the owners of the goods: *Jones v. Corporation of Liverpool* (1885), 14 Q. B. D. 890. But a new trial having been granted the plaintiff says that there is other evidence upon which the order of the Divisional Court may be supported. I attach no importance to the fact that the name of the defendants appears on the plate attached to the waggon in which the goods were carried. I do not see that this differs in principle from the painting of the name upon the safe, which in *Walker v. Hyman* (1877), 1 A. R. 345, was unsuccessfully relied upon as a holding out by the owner of the safe of the person whose name he had thus painted on it being the real owner, his only title being under the ordinary hire receipt.

The subsequent case of *Smith v. Bailey*, [1891] 2 Q. B. 403, is, moreover, a direct authority against the plaintiff upon the very point, practically overruling the old case of *Stables v. Eley* (1825), 1 C. & P. 614, which might otherwise have lent more colour to his contention.

The ground on which alone, as the evidence now stands, I think the order may be upheld is that there is evidence from which the jury might infer that at the time when the accident happened the defendants were employing the driver and the horse and waggon for a purpose for which they had not been lent to them by the Cobban Company. That pur-

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

pose, so far as the evidence discloses it, was to deliver the defendants' goods from their factory to their customers. That seems to have been the limit of their right to control the movements of the driver, and of the purpose for which they might employ the horse and waggon. Then what happened was this: After some goods had been delivered at the shop of one Walmsley, the defendants' foreman, needing a ladder in connection with the work of putting in the glass, and finding that he had none long enough for the purpose, told the driver to go with him to the shop of one Phillips, a painter, where he could get one, and it was while he and the driver were going on this errand that the accident happened by which the plaintiff was injured. It appears to me that it would be for the jury to say whether under these circumstances the driver was still acting within the scope of his employment as servant of the Cobban Company, or whether he was not deviating from that employment and engaged in performing a piece of work for and under the special direction of the defendant company for which the former company had not lent him to them. If this were the case and the journey in question the result of the unauthorized interference of the defendants' foreman, they, and not the Cobban Company, would be answerable for the driver's negligence, on the principle illustrated by such cases as *Storey v. Ashton* (1869), L. R. 4 Q. B. 476, and *Whatman v. Pearson* (1868), L. R. 3 C. P. 422; see *Merritt v. Hepenstal* (1895), 25 S. C. R. 150. The evidence may be developed more fully in another trial than it seems to have been at the last, as to the nature of the arrangement made with the Cobban Company and the extent to which the driver was subject to the orders of the defendants, and I therefore do not further discuss it. Apart from the point which at present sustains the order for a new trial, the plaintiff's right to recover against these defendants seems to depend upon his ability to shew that upon the facts the case falls outside of the line drawn in the "carriage cases" of which *Quarman v. Burnett* is the illustration, and within the decisions of *Rourke v. White Moss*

Colliery Co. (1877), 2 C. P. D. 205, and *Donovan v. Laing, etc., Syndicate*, [1893] 1 Q. B. 629. The case of *Jones v. Scullard* (1898), 79 L. T. N. S. 386, also reported [1898] 2 Q. B. 565, contains a useful discussion of the authorities. The cases of *Johnson v. Lindsay*, [1891] A. C. 371, and *Cameron v. Nystrom*, [1893] A. C. 308, may also be referred to with advantage.

Judgment.

OSLER,
J.A.

Upon the whole I have no doubt that the appeal should be dismissed.

Moss, J.A.:—

The case of *Stables v. Eley* (1825), 1 C. & P. 614, lends some support to the proposition of the plaintiff's counsel that the defendants here, by permitting the van to go out bearing their name upon a large brass plate affixed to it, held themselves out as liable for injury occasioned by the negligence of the person driving it.

But in *Smith v. Bailey*, [1891] 2 Q. B. 403, the Court of Appeal disapproved of it as reported. Lord Esher, M.R., said that, according to the language used in the report, the decision went the length of holding that in such a case there would be conclusive evidence of liability, but if so the decision was wrong and he could not agree with it. He suggested that the extent of the proposition should be that under such circumstances there would be *prima facie* evidence of liability which might be met by shewing the truth of the matter. See as to this *Joyce v. Capell* (1838), 8 C. & P. 370. Lord Justice Bowen added that the only possible explanation of the decision seemed to be that suggested by the Master of the Rolls, and that it appeared to him that the sooner the case disappeared from the text books the better.

But in this case there is other evidence proper to be submitted to a jury as to the liability of the defendants for the negligence of the driver of the van at the time when the accident happened. There is evidence from which it might be concluded that the driver, though the

Judgment.

Moss,
J.A.

general servant of the Cobban Manufacturing Company, was at the time of the accident in the employment and under the control of the defendants. He certainly was engaged in their business at the time.

It does not appear to me desirable at the present stage of the case to comment upon the facts. It is only necessary to say that in view of the principles to be found in such cases as *Rourke v. White Moss Colliery Co.* (1877), 2 C. P. D. 205; *Johnson v. Lindsay*, [1891] A. C. 371; *Cameron v. Nystrom*, [1893] A. C. 308; *Donovan v. Laing, etc., Syndicate*, [1893] 1 Q. B. 629; *Jones v. Scullard*, [1898] 2 Q. B. 565, and other cases, the case ought not to have been withdrawn from the jury.

The Divisional Court, therefore, rightly directed a new trial, and, that being decided upon, could properly give the plaintiff liberty to add the Cobban Manufacturing Company as defendants if so advised: Con. Rules 192 and 206 (2).

The latter company have not yet been added, and it is not very clear that at present they have any status as appellants in this Court.

The appeal should be dismissed with costs.

LISTER, J. A. :—

I am of the same opinion.

BURTON, C. J. O. :—

I quite agree that if a new trial is to be granted it would be proper to make the Cobban Company parties.

But I am unable to convince myself that there is any sufficient reason for granting a new trial. All the evidence was in, and I agree with the learned Judge at the trial that there was none from which the jury could reasonably infer that there was any liability on the part of the defendants, and if the plaintiff is advised that there is sufficient evidence to sustain an action against the other

company, he is not prejudiced by our action in this case.

The *prima facie* case arising from the name of the defendants being on the vehicle is completely met by the evidence.

Judgment.

BURTON,
C.J.O.

The learned Judge at one time thought of leaving certain questions to the jury.

1st. Whether the waggon and horse were the property of the Cobban Manufacturing Company.

2nd. If McKenzie was the servant of that company.

3rd. If the Consolidated Company hired that vehicle from the Cobban Company—but he afterwards abandoned that idea and properly so, as the evidence was all one way ; but there was a fourth question, viz., whether Clement, the foreman of the Consolidated Company, had interfered with the driver.

If there had been any conflict of evidence upon this it would, of course, have been necessary to take the opinion of the jury, but it is undisputed that there was an existing agreement between the Cobban Company and the defendants that the former would supply them with a horse and waggon for the use of the Toronto business at \$3.00 per day.

The sending of the express waggon for a ladder, in order to fit up the window with which they were supplying Scott & Walmsley, was just as much a legitimate order as the direction to deliver goods to their customers ; the hiring was a hiring by the day for any purpose connected with the business of the company which they might reasonably require.

I think the position of the parties in this case is well described in an extract from the Lord Chief Justice's judgment in the recent case of *Jones v. Scullard*, [1898] 2 Q. B. 565 at p. 572 : "The materiality of the ownership of the horse lies in this : so long as the hirer contracts with the livery stable keeper for the supply of a complete equipage to drive him by the day or hour, as the case may be, and the stable keeper in pursuance of that contract supplies carriage, horses, and the man to drive them, the hirer has

Judgment.

BURTON,
C.J.O.

no control whatever over the driver, except so far as he can indicate the direction in which he wishes to be driven. He could not order him to increase his speed, for the driver might lawfully refuse to do so on the ground that he was acting under his master's orders in driving slowly."

That appears to me to meet this case. I quite agree that a man may be the general servant of one person and yet at the same time be the servant of another in relation to a particular matter, and that the test as to whether he is the servant of one person or the other in relation to the particular business in which he is engaged at the time, is which of the two persons had the control of him in the conduct of that business.

The only piece of evidence bearing upon this is that of the foreman of the defendant company. He says he was with the driver, and swears that he had no control over him except to give directions as to where the waggon was to be driven, and in this case having occasion to use a ladder in order to complete the putting in a large fanlight at Scott & Walmsley's, he sent the waggon for one.

This is the only evidence as to the control of the driver. The foreman was controlling him in a way in which he had a clear right to control him, and in that way only, and it seems to me that it would be a misdirection to tell the jury that upon that uncontradicted evidence they might infer that the driver was under the control of the defendants on that occasion.

I regret that the learned Judges of the Divisional Court have given no reasons for granting a new trial, but after a very careful examination of the evidence I have found nothing beyond this to shew that the defendants were exercising any control inconsistent with the control they had a right to exercise under the contract. With great submission I think the learned trial Judge was right in holding that there was nothing for the jury, and his judgment should be restored.

MACLENNAN, J. A. :—

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The plaintiff sues for damages, alleging that he was run down on Church street and seriously injured by a van on runners, driven by the defendants' servant in the course of his duties as such. At the trial the action was dismissed on the ground that the evidence was all one way, that the van and horse belonged, not to the defendants, but to another company called the Cobban Company, and that the driver was not the servant of the defendants but of the other company, and the case was not allowed to go to the jury. The plaintiff appealed to a Divisional Court, which ordered a new trial, and gave the plaintiff leave to amend by adding the Cobban Company as a defendant. The order as to parties is "that the plaintiff be at liberty, on or before the 20th day of February, 1898, to amend his proceedings by adding the Cobban Manufacturing Company (Limited), as parties defendant to this action with apt words to charge them." It does not appear that an amended summons, or an amended statement of claim, or any notice, has been served upon the Cobban Company, as required by Rules 206, 207 and 208, and, therefore, so far as appears, no proceedings can yet be deemed to have been begun against that company: Rule 206 (4). We are, therefore, unable to say whether the case intended to be made by amendment is one of joint liability, or merely of alternate liability. The Cobban Company, however, have appeared before us as appellants, have delivered reasons of appeal, and have argued against the judgment by counsel, and may be deemed to have waived service of summons or other notice, although they do not appear to have been notified of the appeal to the Divisional Court, or to have been represented there. The case made in the statement of claim and at the trial was against the Consolidated Company alone, and no application was made before or at the trial to add the Cobban Company. The judgment dismissing the action was signed on the 27th of October, 1897, and the motion to the Divisional Court was made on the

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27th of November afterwards, and then for the first time the plaintiff asked leave to amend by adding the Cobban Company. In his reasons against the appeal of the Consolidated Company, the plaintiff does not contend for a joint liability of both companies, but only for an independent liability of the original defendants, and there is no suggestion that the presence of the Cobban Company is in any way necessary to the determination of the question of the liability of the other defendants. In his reasons against the appeal of the Cobban Company the plaintiff suggests that he was misled by Mr. Phillips, who happens to be president of both companies, to suppose that it was the Consolidated Company which was liable to him, and I think he means to argue, as was also argued by his counsel before us, that the Cobban Company are proper parties under Rule 192, owing to the uncertainty as to which of the companies is liable. He also says that the two companies are so largely identified that they may almost be regarded, so far as he is concerned, as one company, but I think there is no ground whatever for that contention. Whether, therefore, the companies were jointly liable or not, the case is an action against one, tried out to judgment, and the other tortfeasor added afterwards, on the ground, either that both are or may be liable, or that it is uncertain which of them is liable. Now when it has been tried and found that one is not liable, it can be no possible reason for trying that question again that possibly the other may be liable. A stage has been reached in which it has been established that one at least is not liable, and whether the other is liable or not may be determined in another action against him alone. While, therefore, the possible liability of the Cobban Company is no reason for granting a new trial against the Consolidated Company, if there was any other good reason, I think it was quite proper to give leave to join the Cobban Company because it would still be sufficiently uncertain which of the two companies, if either, might ultimately be found responsible: Rule 192; *Tate v. Natural Gas Co.* (1898), 18 P. R. 82. Both appeals must then, as I think, depend on whether, wholly

irrespective of the Cobban Company, and treating the action as an independent action against the Consolidated Company, which has been tried out to judgment, there is good ground for granting a new trial. We have not the advantage of knowing the grounds on which the new trial was granted, as there was no written judgment, and upon the best consideration which I have been able to give to the case, I am unable to see any sufficient grounds for it. The van and the horse belonged to the Cobban Company, and the driver was employed and paid by them also. By contract between the two companies, the service of the van, horse and driver was let to the Consolidated Company whenever required at \$3.00 a day. When the accident occurred, the horse was being driven by the driver so employed, on the business of the Consolidated Company, and a foreman of the Consolidated Company was riding upon the van with the driver. If there was any negligence it was the negligence of the driver, the foreman not having interfered in any way with the driver, except in a general way to tell him where to go. All these facts were clearly proved and undisputed, and there was no evidence to the contrary. In the late case of *Jones v. Scullard*, [1898] 2 Q. B. 565, the Lord Chief Justice reviews all the authorities very fully. In that case the defendant was the owner of a brougham, horse and harness, and the horse was driven by the servant of a livery stable keeper who had supplied him to the defendant for the purpose, and had been supplying the same man continuously for the preceding six weeks. There were also some other circumstances from which the Chief Justice held a jury might properly infer that at the time of the accident the driver was acting as the servant of the defendant, so as to make the latter responsible for his negligence in driving. In discussing the case of *Quarman v. Burnett* (1840), 6 M. & W. 499, a case very like the present, and which, if undistinguishable, must govern our decision, the learned Chief Justice casts no doubt upon its correctness, but points out wherein it differed from the case before him. At p. 572 he points to the ownership of the

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Judgment. horse, and says : "The materiality of the ownership of
MACLENNAN, the horse lies in this: so long as the hirer contracts with
J.A. the livery stable keeper for the supply of a complete
equipage to drive him by the day or hour, as the case may
be, and the stable keeper in pursuance of that contract
supplies carriage, horses, and the man to drive them, the
hirer has no control whatever over the driver, except so
far as he can indicate the direction in which he wishes to
be driven. He could not order him to increase his speed,
for the driver might lawfully refuse to do so on the
ground that he was acting under his master's orders in
driving slowly. But where the hirer of the coachman is
himself the owner of the horse, he is entitled to dictate to
the driver as to how fast he shall drive, and the driver is
bound to take his orders from him. The driver is in that
case under the control of the hirer as to the manner of
driving." All that is applicable to the present case, and
the present is even a stronger case than *Quarman v.*
Burnett, for there the brougham belonged to the ladies, and
only the horse and driver were supplied by the livery-
man, while here the whole equipage belonged to the
Cobban Company. The learned Chief Justice also discussed
two other cases to which we were referred, viz., *Rourke v.*
White Moss Colliery Co. (1877), 2 C. P. D. 205, and *Donovan*
v. Laing, etc., Syndicate, [1893] 1 Q. B. 629, and points
out that in those cases the servant was distinctly under the
control, not of his general master, but of the party in whose
temporary service he was placed, and at p. 574 he says :
"Now apply the principle of those cases to the facts of the
case before me. What control had the livery stable
keeper over the driver while driving the defendant's horse ?
Absolutely none. The whole control was in the defendant,
who could have ordered the driver to go fast or slow, or
stop or go on, just as he pleased, or to keep the horse
without food, or otherwise manage the horse as he
directed." He also quotes from the judgment of Bowen,
L. J., in *Donovan v. Laing, etc., Syndicate* : "The principal
part of the argument for the plaintiff was founded on what
may be called the carriage cases : *Laugher v. Pointer*

(1826), 5 B. & C. 547, and *Quarman v. Burnett* (1840), 6 M. & W. 499, but they really have nothing to do with the point presented in this appeal. If a man lets out a carriage on hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. The coachman does not become the servant of the person he is driving ; and if the coachman acts wrongly, the hirer can only complain to the owner of the carriage." The Chief Justice further goes on to say that "the principle to be extracted from the cases is that if the hirer simply applies to the livery stable keeper to drive him between certain points or for a certain period of time, and the latter supplies all necessary for that purpose, the hirer is in no sense responsible for any negligence on the part of the driver." It seems to me the present case is exactly within that principle and that the learned Judge was right in dismissing the action. It was strenuously urged at the trial that the learned Judge should submit the question to the jury. There was no disputed evidence, nor, as I think, any room for drawing an inference from the evidence favourable to the plaintiff, as the learned Chief Justice thought there was in the case before him. *Quarman v. Burnett* went to the jury with the approbation of the Judge at the trial, with leave to move for a nonsuit, and the motion for a nonsuit was made absolute by the Court. I am unable to agree in the view of my brother Osler that going for the ladder was not, or might be found by the jury not to be, within the purposes for which the van, horse and driver were employed by the defendants. The undisputed evidence is that the hiring was not merely for the delivery of their goods, but for the defendants' business, and the ladder was being procured in order to complete the delivery of the glass at Scott & Walmsley's, which could not be properly done without it.

Appeal dismissed, BURTON, C. J. O.,
and MACLENNAN, J.A., *dissenting*.

R. S. C.

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MACLENNAN,
J.A.

GOLD MEDAL FURNITURE MANUFACTURING COMPANY
v. LUMBERS.

Landlord and Tenant—Notice to Quit—"Disposing" of Premises—Covenant for Quiet Enjoyment.

A lease provided that in the event of the lessor "disposing" of the building the lessees should give up possession on certain notice; and soon after the lease was made notice was given by the lessor in assumed compliance with this proviso, and possession was given up by the lessees by consent but under protest before the expiration of the time limited by the notice. The alleged "disposal" of the building consisted in the making of an agreement by the lessor with a person who was to have the superintendence of the building, to obtain tenants for the lessor, and to collect rents, with the right to take a sub-lease himself in certain events with an option to purchase:—

Held, per BURTON, C.J.O., and MOSS, J.A.—That this was not a disposal of the building within the meaning of the proviso, and that the lessor was liable in damages, he having misled the lessee to the latter's prejudice in reference to a fact within his own knowledge and in reference to which there was a legal obligation upon him to state the truth.

Per OSLER, J.A.—That (on the evidence) the plaintiffs were not deceived or misled by the notice and were not entitled to damages.

Per MACLENNAN, J.A.—That there was a disposal of the building within the meaning of the proviso, but that even if there was not, there was no right of action in the nature of an action of deceit, the notice having been given in good faith; and no right of action for breach of the covenant for quiet enjoyment, the notice, if bad, not affecting the lessee's rights.

In the result the judgment of ROSE, J., 29 O. R. 75, was affirmed.

Statement.

THIS was an appeal by the defendant from the judgment of ROSE, J., reported 29 O. R. 75, and was argued before BURTON, C.J.O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 1st, 2nd, and 3rd of June, 1898.

Watson, Q.C., and S. C. Smoke, for the appellant.

S. H. Blake, Q.C., and F. C. Cooke, for the respondents.

January 24th, 1899. BURTON, C. J. O.:—

As at present advised, I should have thought it doubtful whether the judgment could be sustained on the ground that the giving of the notice was a breach of the covenant for quiet enjoyment, but it is not necessary to consider it, as I think the judgment can be supported on other grounds.

With great deference, I should have thought it clear that what was meant in the proviso in the lease was a

sale or absolute parting with the property by the lessor ; both parties to the contract so treated it at the time the notice was given, and in the correspondence which ensued upon it, and I think it clear that the arrangement with Gardner, even if that had been in existence at the time the notice was given, was not such a disposal of the property as is contemplated in the lease.

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But it was strongly contended that when the defendant inserted a clause in the lease, giving him an opportunity to cancel in the event of the property being disposed of, it imposed upon him an obligation to state the true facts, and if he stated anything which it was his duty to communicate, and stated it untruly, it became a misrepresentation within the purview of the law as to fraud, upon which the action for deceit is maintainable.

Derry v. Peek (1889), 14 App. Cas. 337, which the learned Judge seemed to regard as opposed to his holding that there was fraud in the present case warranting a recovery, establishes this, that an action for deceit by reason of negligence in making misrepresentations does not lie in the absence of contract, and that negligence is not actionable in the absence of some duty to be careful created by contract. The only one of these two persons who was in the position to know whether there had been a disposal of the property within the terms of the lease entitling him to give the notice was the defendant Lumbers, and if he misstated that fact, there being a legal obligation upon him to state the truth, he was, in my opinion, liable to an action if the other party to the contract *bonâ fide* acted upon it, which the learned trial Judge has found that he did.

Although, therefore, upon different grounds, I think the judgment should be affirmed.

OSLER, J. A. :—

The plaintiffs, who are a partnership firm carrying on business under this attractive name, on the 12th of November, 1896, leased from the defendant certain flats or

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rooms in a large factory building belonging to the latter for the term of three years and two months from the 1st of December, 1896. Their lease is expressed to be made in pursuance of the Act respecting Short Forms of Leases and contains the usual covenant for quiet enjoyment and also the following proviso: "Provided that in the event of the lessor disposing of the factory the lessees will vacate the premises if necessary on receiving six months' notice or a bonus of \$350." It was very much to the defendant's interest that he should entirely get rid of the factory, which was *damnosa hereditas* to him, although as regards the part leased to the plaintiffs the rent seems to have been a profitable one.

In December of the same year 1896, the defendant was negotiating an arrangement with a person named Gardner, and on the 31st of that month, having as he thought brought it to a conclusion, except that it was not finally reduced to writing, he gave the plaintiffs the following notice: "As I have disposed of my interests in the factory premises I beg to notify you that you will be required to vacate that portion of the premises occupied by your firm on or before the 1st July, 1897."

In point of fact the agreement the parties were negotiating was not finally settled and signed until the 11th of January, 1897. As then signed it was, however, one similar to that which the defendant supposed he had secured on the 31st of December, with some unimportant variations in the terms. In substance it provided that Gardner was to manage the factory for a year (apparently without any direct compensation) until the 1st of January, 1898. The defendant was to advance \$1,000 for repairs and improvements to be expended by Gardner under his directions, and Gardner was to use every effort to get tenants at the highest rents. These rents were to be paid to and to be the defendant's property. The leases were to be in his name and the tenants his tenants. If at any time during the year the income exceeded the expenditure, Gardner had the right to require Lumbers to grant him a sub-lease of the factory

for the residue of the term, less one day, for which Lumbers himself held it. And if on the 1st of January, 1898, the same state of affairs existed and from the nature of these existing circumstances it should appear probable that it would continue for three months longer, Lumbers had the right to require Gardner, and the latter was bound, to accept a similar lease, and he was also to have the option at any time during the proposed tenancy of purchasing the lease from the Land Security Company to his lessor.

Some time during the month of January, 1897, the defendants consulted their solicitor to know if it would be wise for them to remain and let the defendant prove his sale and were advised not to do so lest they might be sued for damages. Then they applied to the defendant to know if they might be permitted to move at any time as the six months would expire at a very inconvenient time for them, and they addressed Gardner on the same subject who wished them to move at once. Lumbers, at their instance, wrote the letter of the 22nd of January, 1897: "In reference to the notice I gave you to vacate on the 30th June next, I understand you wish me to state that in the event of your wishing to move previous to the time stated that you may be relieved of the liability to pay rent after the premises are vacated: to which proposition I reply that when I disposed of the premises I had the option, etc., and that I availed myself of the former course and gave you the six months' notice, and my settlement with Mr. Gardner, to whom I sold the property, was completed with the calculation that you would remain in possession and pay me the rent of same for the six months. However," etc., and then the defendant goes on to say that they may vacate the premises at the end of any month, giving one month's notice, and paying rent up to the date of leaving.

To this the plaintiffs, who had in the meantime consulted their solicitor as above stated, replied on the 29th of January: "In reply to your two notices, December 30th, and January 22nd, would say it is very inconvenient for us to move at present as our stock is very large and as June is our busy

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month and we could not move. However, we have no option in the matter as you say you have sold property so we hereby notify you that we will vacate our present premises the end of February, 1897, under protest, as we can find no sale registered."

The plaintiffs finished moving into other premises on the 28th of February, 1897, and on the following day their solicitor wrote to the defendant claiming damages for loss sustained by fraudulent misrepresentations, stating that it had recently come to their knowledge that no sale or disposition had in reality been made by him and that he had deceived the plaintiffs by representing that it had, and had caused them to surrender their lease and move out at great loss to themselves.

On the 3rd of March, this action was commenced. It was launched and tried out as an action of deceit but the learned trial Judge while not expressly deciding that it was not maintainable on that ground, held that the plaintiffs were entitled to recover as for a breach of the covenant for quiet enjoyment and gave judgment on that ground with leave to the plaintiffs to amend their statement of claim.

On the argument of the appeal, and again on reading the evidence, I was struck with what appeared (to me at least) the unbusinesslike course taken by the plaintiffs on being told of the alleged disposition or sale of the factory. Conceding that they might have taken the defendant at his word and might have made their preparations for moving out in due course (and they had six months' time before them) on receiving the notice of the 31st of December and the letter of the 22nd of January, yet if this would have involved them in heavy loss and expense the natural and reasonable course for them to have taken was to have asked the defendant to tell them exactly what was the nature of the disposition or sale which had been made so that they might form their own judgment upon it, and the more so as it was not every disposition of the factory upon which the proviso would take effect. I am not

indeed satisfied that it was not the plaintiffs' right to demand, and the defendant's duty to give, this information. The plaintiffs or their solicitors could but have received a refusal to give any information, which would not have altered their own position and would have placed the defendant very much in the wrong as regards the costs of future litigation; while a candid explanation would probably have resulted in the avoidance of a lawsuit, the object which the plaintiffs profess to have had in view—at all events with themselves as the defendants. Yet, notwithstanding the inconvenience and loss which a change in their business premises would involve, and notwithstanding the fact that their suspicions actively existed from the first as to the reality of any sale or disposition, the plaintiffs at once proceeded to act as if everything was regular, and to take the course which, had they really desired to avoid it, an explanation, had it been called for and given, would have obviated. It is difficult not to believe that the plaintiffs, conscious of the situation in which they were placed and of the uncertainties to which they were exposed by the proviso in their lease and knowing that it was the defendant's intention to dispose of the factory as soon as he could, and that if it were not to-day it might be to-morrow, determined to take advantage of the first danger signal, whether true or false, and secure for themselves a retreat on the best terms they could obtain.

Having given the case the most attentive consideration in my power I am of opinion that under the circumstances the action is not maintainable as an action for deceit or as upon a breach of the covenant for quiet enjoyment. In speaking of the former I embrace for the present purpose an action founded on the breach of any "legal obligation on the defendant to state the truth correctly to the plaintiff," as suggested by Lord Denman in *Barley v. Walford* (1846), 9 Q. B. at p. 208; and perhaps by Lindley, L. J., in *Low v. Bouverie*, [1891] 3 Ch. 82, 100; and by Bowen, L. J., in the same case, at p. 105; and in *Le Lievre v. Gould*, [1893] 1 Q. B. 491, 501.

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In the case of a landlord obtaining possession of the premises by a trick or false statement, such as complained of here, the term would not be extinguished, the property might be recovered back so long at all events as it had not passed away from the landlord ; and in some form of action, either on the covenant or in case, the tenant might recover compensation for the damage he had sustained by going out of possession. But in whatever form he might seek relief I think he certainly would not obtain it without proof that in going out of possession he relied upon the false statement complained of. If he was not induced to take the course he did by reason of the false statement but from some other motive he cannot be heard to say that he was deceived or misled by it: *Smith v. Chadwick* (1881), 20 Ch. D. 27 ; (1884), 9 App. Cas. 187.

I find in the evidence of McMurtry, one of the members of the plaintiffs' firm, the following :

"Then when did you find out that Mr. Lumbers had not really sold the premises? We only really found it out on his examination. We thought he had not sold before, but we were not positive. Somebody told you something, I want to get at about what period? About the 1st February. Somebody told you something that made you believe that he had not really sold the premises? Yes, sir. And then did you see anybody about that, or how did you acquire it? (*sic.*) I went to my solicitors in the matter. I had been to them previous to this and asked them if we could not remain on and fight Mr. Lumbers because we were a little suspicious, though we had nothing to prove it. And on the advice of your solicitor? We decided to move out and sue for damages. Then you went to Mr. Akins, and what else was there before you commenced your action that led you to think Mr. Lumbers had not sold the premises? Well the tenants still paid their rent to Mr. Lumbers I was told. As far as I could learn from them they all paid rent to Mr. Lumbers as before."

There is no evidence that the state of the plaintiffs' knowledge of the subject on the 1st of March, when their solicitor threatened to bring the present action, was different from what it was in the beginning of February when they began to move away. If the plaintiffs did not believe that a sale or disposition had been made of the factory they cannot I think be justly held to have been deceived or misled by the representations of which they now complain. Can one in their situation say: 'I do not believe what I have been told but will act as if I did without further enquiry, and then sue for damages'? I think not. Under such circumstances it seems to me that the plaintiffs must be held to have invited—if they did not desire to incur—these damages, and to have brought their loss upon their own head.

There is another difficulty in the plaintiffs' way. The defendant had the option of giving the plaintiffs a six months' notice to quit or of paying them a bonus of \$350 for immediate possession. I suppose it is clear that if the defendant had adopted the latter course the plaintiffs could not have maintained such an action as this without returning or tendering back the bonus they had received. The defendant chose the former alternative, giving the plaintiffs six months' notice to quit. Though their suspicion was even then excited as to defendant's right to give the notice, they proceeded to make a bargain with him, whereby they gave up the premises at a time when the defendant was not bound to take them, and were relieved from the payment of four months' rent and obtained the additional advantage, on which they laid much stress, of being enabled to move out at a time to suit themselves. Now they complain that it was by reason of the defendant's fraud that they were compelled to do so. I am not sure that this new bargain does not of itself place all parties upon a different footing, but, however that may be, can the defendants assert such a demand without at least paying or offering to pay the rent, which, but for the agreement, bottomed as they say it

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Judgment. was upon the defendant's fraud, the defendant would have
OSLER, received from them? I think they cannot. Upon the whole
J.A. it appears to me that the appeal should be allowed and the
action dismissed.

MACLENNAN, J.A. :—

I am of opinion, with great respect, that this appeal should be allowed.

After a careful consideration of the agreement between the defendant and Gardner, I think it was a disposition of the factory within the meaning of the lease to the plaintiffs. It gave Gardner the option of buying the defendant's term at any time for \$25,000, an option which he could have exercised the very next day. It also gave him the right to deal with the other tenants, and the other parts of the premises, by repairs, and improvements, and expenditure, and even by new buildings, so as to increase the rents and to reduce running expenses. The defendant was to contribute \$1,000, if necessary, to meet expenditure, but there was no restriction upon the amount which Gardner might have expended of his own money. The defendant's advances were to be made before the ensuing first day of June, and he was to be entitled to the rents during that interval. In the event of the income exceeding all outgoings by the 1st of January, 1898, with a probability of its continuance for three months longer, Gardner was entitled to have, and was bound to accept, a sub-lease at a rental equal to all outgoings for the remainder of the defendant's term, in certain instalments. The learned Judge has found that the agreement was made by the defendant in good faith, and I think his finding in that respect is supported by the evidence. That being so, I think the agreement was a reasonable and provident one on the part of the defendant, having regard to the nature of the property, and the encumbrances upon it. I also think it was a disposition of the property within the meaning of the lease held by the plaintiffs. "Disposition" is

a word of large meaning, and I think the agreement in question might properly be so designated. It may be a question whether there was any binding agreement between the defendant and Gardner on the 31st of December, when the notice to quit was served, and, if so, the notice was premature. It was only in case of a disposition of the factory that the defendant was entitled to give a notice to quit at all. However that may be, the agreement was made on the 11th of January, and although the plaintiffs might have treated the notice as insufficient, they chose to accept it, and having done so cannot now complain.

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But, even if there had been no disposition of the factory within the meaning of the lease, I am of opinion that the action must have failed. The learned Judge has found that there was no fraud, on the part of the defendant, in notifying the plaintiffs that he had made a disposition of the factory, and that the action could not be maintained as an action of deceit, and I think that in that respect the judgment is clearly right. But the judgment is rested on the covenant for quiet enjoyment, on the ground that there not having been a disposition of the property, the notice to quit was a breach of that covenant. I am unable to agree in that conclusion. The notice was that the defendant had disposed of his interest in the factory premises, and that the plaintiffs were required to vacate the portion occupied by them on or before the 1st of July, 1897. The plaintiffs did not believe that the defendant had really sold the property, but as McMurtry, the chief partner in the firm, says in his evidence, they decided to move out, and to sue for damages. They then applied to the defendant, and proposed to move out immediately, in consideration of being relieved from the payment of rent. This was agreed to, and the defendant wrote the plaintiffs a letter, dated 22nd of January, agreeing to release them from subsequent rent, in the event of possession being given up at the end of any month between that time and the 30th of June, and one clear month's notice being given of the intention to do

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MACLENNAN,
J.A.

so. This was answered on the 29th of January, notifying the defendant that they would vacate the premises at the end of February, and they added that they would do so under protest, as they could find no sale registered. In accordance with this notice they went out at the end of February. Now, I am at a loss to understand how the plaintiffs can upon these facts maintain an action for breach of the covenant for quiet enjoyment, even assuming that the agreement was not a disposition within the meaning of the lease. A landlord, who has entered into a covenant for quiet enjoyment, thinking he is entitled to give a notice to quit, does so. The tenant comes to him and says: "Your notice is insufficient, it is too short," or "You have no right to give me a notice to quit at all, nevertheless if you relieve me from subsequent rent, I will go out at once, or at an earlier day than the notice calls for." That is agreed to, and he goes out. The covenant is that the tenant "shall and may peaceably possess and enjoy * * without any interruption or disturbance from the lessor." The proposition comes to this, that a mere notice to quit, if irregular or insufficient, or wholly unauthorized, not followed by any action, or any actual disturbance, or interruption of enjoyment, or possession, or title, is a breach of the covenant. If in such a case the tenant goes out that is his own voluntary act. Here it was not only voluntary, but in pursuance of an agreement for value. If there was no disposition, or if the notice was too short, the term was not put an end to by the notice, and in any case would not be terminated before the 1st of July. But it was, in fact, terminated at the end of February by the agreement of the parties for valuable consideration. I have not, after a diligent search, found any case in which it was ever held that an irregular or void notice to quit was a breach of the covenant for quiet enjoyment, nor that a tenant was at liberty to act upon such a notice, and then to sue as for a breach of covenant. My learned brother thought the case governed by *Edge v. Boileau* (1885), 16 Q. B. D. 117, in which Pollock,

B., held that where a landlord notified the sub-tenants of his lessee not to pay their rent to the lessee but to him, and threatened legal proceedings if they did not comply, in consequence of which one of the tenants did pay his rent to the landlord, there was a breach of the covenant for quiet enjoyment. I think that is a very different case from the present. In that case the interference with the sub-tenants was a clear disturbance of the plaintiff's enjoyment, which consisted mainly in the regular receipt of the rents. The following are some of the later cases which illustrate the character of the acts which will be breaches of such a covenant: *Howard v. Maitland* (1883), 11 Q. B. D. 695, in which the Court of Appeal held that a decree in Chancery establishing a commonable right over the devised land, and which was binding on the lessor, was not, alone, without any entry or actual disturbance of the tenant or his possession, a breach of the defendant's covenant. In *Sanderson v. Mayor of Berwick* (1884), 13 Q. B. D. 547, also in the Court of Appeal, the covenant was held to be broken by an escape of water over the tenant's land, by reason of the improper construction of drains in adjoining land by the lessors, and Fry, L. J., delivering the judgment of the Court (p. 551), said: "It appears to us to be in every case a question of fact whether the quiet enjoyment of the land has, or has not, been interrupted; and where the ordinary and lawful enjoyment of the land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be affected." In the very latest case, *Manchester, etc., R. W. Co. v. Anderson*, [1898] 2 Ch. 394, Lindley, M. R., observes of the *Sanderson* case, that it is the case that has carried the liability upon the covenant of quiet enjoyment farthest, but that the judgment in that case must be taken with reference to the facts then before the Court.

For these reasons, I think the defendant's appeal ought to succeed, and that the action ought to be dismissed.

Judgment. MOSS, J. A. :—

Moss,
J.A.

The appellant's counsel contended strongly that the agreement or arrangement entered into between the appellant and Gardner, embodied in the instrument of the 11th of January, 1897, was a disposition of the factory within the meaning of the proviso in the lease from the defendant to the plaintiffs.

If that were so found it would put an end to all the other questions which were so fully and ably argued before us.

But the learned trial Judge decided against this contention, holding that by entering into the arrangement with Gardner the defendant did not dispose of the factory within the meaning of the proviso, and in this I agree with him.

I think that by the terms "in the event of the lessor disposing of the factory" is meant more than a mere re-arrangement of the then methods of leasing portions or sections of the factory. It means some such disposition as could not be effectually made to the disponent so as to vest it in him for the purposes for which he designed becoming the holder or proprietor without the surrender by the plaintiffs of their lease; some disposition of the property taking it out of the hands or control of the defendant as the proprietor and vesting it in some other person as the beneficial holder or proprietor.

An absolute sale of the whole premises would obviously be such a disposition and so probably would a lease of the entire premises to be used by the lessee as one factory or warehouse, and other cases might be suggested.

But without attempting to suggest instances it is sufficient to say that the arrangement with Gardner does not appear to me to fall within any class that can fairly be included in the terms of the proviso.

As appears by the instrument of the 11th of January, 1897, it is a mere deed of management of the property on behalf of the defendant for a period of nearly twelve months with an option to Gardner to become in certain

contingencies the lessee for a term of years with a right to purchase to be exercised at his option during the term upon certain specified conditions.

Judgment.

Moss,
J.A.

In the meantime the property remains vested in the defendant, all the outlay required to be made in connection with it is to be made by him and he is to receive the rents or income derived from the premises.

It is impossible to describe the arrangement with Gardner as a sale, and it is as difficult to say that it was a disposition of the kind to call into being the right to give notice to terminate the plaintiffs' lease.

From the evidence it appears that the defendant became possessed of the premises as an unwilling party, compelled to take them over in order to indemnify or save himself in respect of a transaction entered into for the benefit of others, and anxious to sell and rid himself of a burdensome property at as early a day as possible. It was with the object of enabling himself to so deal with the property without being hampered by the lease to the plaintiffs that the proviso was inserted in it.

I find it difficult to accept the learned trial Judge's conclusion that the defendant believed in good faith that the disposition made was such as was contemplated. I think the evidence shews that in making the representation that he had disposed of his interest in the factory premises, he was intending to lead the plaintiffs to believe that he had so parted with them as to be no longer their proprietor or controller.

He could scarcely have believed that he had made a sale to Gardner or that his arrangement with him was a complete disposal of his interest in the premises, yet that is what his letter to the plaintiffs of the 31st of December, 1896, represented. Meharg, the defendant's business manager, was a witness at the trial and in answer to the question "You stated to the plaintiff why you wished that clause in it?" stated "Yes, I told him we might wish to sell the property."

The plaintiffs' mind was thus prepared, when the state-

Judgment.

Moss,
J.A.

ment was made that the defendant had disposed of his interest in the property, to conclude that a sale had been made. And in the subsequent interview in January, after the plaintiffs' receipt of the letter of 31st December, the defendant made the statement that Mr. Lawrence (who subsequently turned out to be Gardner) had bought the property. He referred the plaintiffs to Lawrence, or Gardner, as the purchaser, and he confirmed the defendant's statement that he had bought the property. The defendant admitted having told McMurtry this. And the letter of the 22nd of January, 1897, to the latter contains the statement: "And in my settlement with Mr. Gardner to whom I sold the property," etc.

I regard this as one of those cases referred to by Lord Herschell in *Derry v. Peek* (1889), 14 App. Cas., at p. 369, in which there is such an absence of reasonable ground for the belief that there was a sale, or a disposition, such as contemplated by the proviso in the lease, as, in spite of the assertion to the contrary, to carry conviction to the mind that there was not really the belief which is alleged.

But, apart altogether from that, I think there was in this case a duty or legal obligation on the part of the defendant to speak the truth, and that he is not in a position to shelter himself behind the plea of good faith and want of knowledge.

By the terms of the proviso, he was bound to the plaintiffs to inform them truly when seeking to invoke against them the right to terminate the lease. There was a duty imposed upon him not to be negligent or careless, and the facts were within his own knowledge.

Therefore, when making a statement or representation to the plaintiffs with a view to their acting upon it in order to benefit himself, he was bound to speak the truth.

And the right to maintain an action for damages in such a case has not been affected by the decision in *Derry v. Peek*, or anything that was said in the judgments in that case.

In *Low v. Bouverie*, [1891] 3 Ch., at p. 100, Lord Justice

Lindley says: "I do not, however, understand *Derry v. Peek* to apply where there is a legal obligation on the part of the defendant towards the plaintiff to give him correct information. If such an obligation exists, an action for damages will, I apprehend, be for its non-performance, even in the absence of fraud: see *per* Lord Denman in *Barley v. Walford*."

Judgment.

Moss,
J.A.

In *Le Lievre v. Gould*, [1893] 1 Q. B., at p. 501, Lord Justice Bowen, notwithstanding *Derry v. Peek*, recognizes the existence of a class of cases in which negligent misrepresentation can give rise to a cause of action, if a duty lies upon the defendant not to be negligent.

See also Moncrieff on Fraud and Misrepresentation, at p. 153 *et seq.*, for a discussion of the cases up to the date of publication.

I think the defendant's liability may be rested upon the proviso, and the legal obligation thereby created to give the plaintiffs correct information, and I prefer to rest my conclusion upon that ground rather than upon a breach of the covenant for quiet enjoyment.

I think the plaintiffs did not forego their rights by arranging to quit the premises at an earlier period than they were required to do by the terms of the proviso. That they left at all was due to the defendant's action, and their leaving when they did was productive of less damage than if they had delayed moving until the expiry of the period named in the notice.

Stress was laid upon some of McMurtry's answers at the trial in explanation of the plaintiffs' attitude in going out although not wholly satisfied with the defendant's statements. But it seems plain that whatever doubts he felt he had nothing to disprove the statement that a sale had been made, and under the circumstances he decided to move out and sue for damages if it afterwards turned out that the defendant was misleading them. And this does not strike me as an unreasonable course.

It certainly was the plaintiffs' right to require, and the defendant's duty to give, exact information as to the

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Moss,
J.A.

nature of the disposition that had been made, and the defendant did assume to give such information by asserting that a sale had been made.

The defendant ought not to be heard to say that the plaintiffs were wrong in giving him credit for the truth of what he said, and although they were suspicious they had no information to justify them in resolving to wholly disregard and disbelieve the defendant's repeated statements that he had sold the premises: *Barley v. Walford* (1846), 9 Q. B. 197; *Cowling v. Dickson* (1880), 5 A. R. 549; *Redgrave v. Hurd* (1881), 20 Ch. D., at pp. 13, 14 and 23.

I do not understand the learned Chief Justice of the Queen's Bench, and Cameron, J., whose decision in *Cowling v. Dixon* (1880), 45 U. C. R. 94, was overruled in appeal, to have entertained a different view as to the obligation of a party to a proviso somewhat similar to that in this case, to give correct information. Cameron, J., at p. 102, says: "The plaintiff would have been justified in acting upon the notice and accepting it as true for the purpose of the action intended, but not for some other action, and he would have been entitled to recover for any loss resulting from acting in accordance with the notice."

The difference between the majority of the Queen's Bench and the Court of Appeal was with respect to whether the plaintiff could recover without having actually gone out of the premises in pursuance of the notice.

If the plaintiffs' right is not to recover as for a breach of the covenant for quiet enjoyment, the measure of damages may not be as suggested by the learned trial Judge.

This question will be properly dealt with by the Master, to whom the parties desired the question of damages to stand referred.

The appeal ought to be dismissed with costs.

*Appeal dismissed, the members of the
Court being equally divided in opinion.*

R. S. C.

ROBINSON V. PURDOM.

Easement—Right of Way—Limited Grant—Colourable User.

A right of way granted for the benefit of a specific lot cannot be used by the owner of that lot generally apart from his ownership and use of the lot.

Judgment of MEREDITH, J., affirmed.

THIS was an appeal by the defendant from the judgment of MEREDITH, J., and was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 23rd of November, 1898. The facts, and the contentions of the respective parties, are stated in the judgments. Statement.

T. H. Purdom, for the appellant.

D. J. Donahue, for the respondent.

January 24th, 1899. Moss, J. A. :—

The plaintiff is the owner of ranges of village lots in the village of Port Stanley, laid out upon a plan of a part of township lot No. 1 in the 1st concession of Yarmouth registered as plan No. 177. Some of the lots front upon Lake Erie, and intervening between them and the waters of the lake is a strip of beach under the bluff or rise of land which at the time of the original survey of the township and for many years afterwards formed the front of the township lot upon the waters of the lake.

One range is composed of seven lots numbered from one to seven commencing at the eastern boundary line of the township lot separating it from township lot No. 2.

Some distance to the east of township lot No. 1, a range of building lots has been laid out on township lot No. 2, fronting upon Lake Erie, upon which there are from fifteen to twenty dwellings owned and occupied as summer residences by persons living in London, St. Thomas, and other inland places. This locality and the beach in front of it have been designated and are known by the name of Orchard Beach.

Judgment.

Moss,
J.A.

The defendant is owner of one of the residences of Orchard Beach and has for a number of years occupied it with his family during the summer months. A very convenient way for the residents of Orchard Beach to reach the principal points of the village and to get to and from the railway station and the steamboat landing is to cross the beach in front of the plaintiff's lots westerly until Main street, a leading highway, is reached.

In the summer of 1897 the defendant and his family were in the habit of making use of the beach in question in the manner described, and being warned to desist did not do so, but persisted in using and claiming the right to use the beach as a way to and from the defendant's premises at Orchard Beach. Thereupon this action was brought on the 10th of August, 1897, claiming that the defendant was guilty of trespassing upon the plaintiff's property and seeking an injunction.

The lots in the range from one to seven were intended to be sold, and some of them were before the commencement of this action sold to purchasers, and it being the intention and desire of the plaintiff to retain and preserve the beach in front for the enjoyment, use and benefit of the proprietors and residents, provision for that purpose was made in the conveyances to the purchasers.

Among others lot No. 3 was sold and conveyed to one Frederick Henry, coupled with a grant of certain privileges in respect of the beach in terms which were afterwards inserted in the deed from Henry to the defendant hereafter referred to.

Before the commencement of this action the defendant and the other residents of Orchard Beach claimed a right of way or passage over the plaintiff's beach as of right, asserting that it formed part of a public highway along the shore of the lake, or if not that it had been dedicated to the public, or had become a public way open to be used and traversed by any of Her Majesty's subjects, or that there existed over it an easement or prescriptive right in favour of the residents of Orchard Beach.

But upon the commencement of this action it appears to have occurred to the defendant that he might be able to buttress his position by obtaining title to some portion of lots one to seven inclusive, and he purchased from Henry the east half of lot three. The deed of conveyance besides granting the moiety of the lot contained the following, copied almost verbatim from the deed of conveyance from the plaintiff to Henry, viz., "Together with the sole right to erect and use upon the beach in front of said easterly half of lot three a private bath and boat house and the right to use the beach in front of said lots, one to seven inclusive, on said plan for right of way, bathing, boating, and all other pastimes, in common with the owner or owners of the property as shewn on said plan, their tenants and guests residing on said property, reserving to each owner of said lots, one to seven, the right to erect a private bath and boat house on the beach in front of their respective lots, and together with the full right and liberty for the party of the second part, his tenants, servants and guests, in common with the other owners of the property mentioned in said plan, to use all the rights of way shewn on said plan, and a right of way along said beach from east to west, reserving to one John A. Robinson the right to erect fences with gates across said right of way on beach to prevent the public entering thereon."

Judgment.

Moss,
J.A.

This deed is dated August 14, 1897, four days after the issue of the writ of summons in this action.

In his statement of defence the defendant did not confine himself to the assertion of such rights as he secured by virtue of the deed from Henry, but set up, and at the trial insisted upon, the right to the use of the beach as of right upon the grounds before mentioned as well as by reason of the deed, and he adduced evidence which he maintained supported these several defences.

The learned trial Judge determined the case against him, and on this appeal he still adheres to all the grounds he put forward at the trial.

Judgment.

Moss,
J.A.

A careful perusal and consideration of the evidence leaves no doubt on my mind as to the correctness of the learned trial Judge's conclusions with regard to the claims of a public right either from original reservation or subsequent dedication, or of a private right or easement founded on prescription or long and continued user sufficient within the statute. The grant from the Crown of the township lot contained no reservation. The evidence does not shew a continued user of a defined or any way openly and as of right and acquiesced in for the statutory period. The only evidence of dedication relied upon was the placing of a sidewalk over the beach within the last four or five years at the instance of the residents of Orchard Beach and since used by them in the summer season. But this was laid there under arrangement with the plaintiff who reserved all his rights, and it was so constructed as to be capable of removal at any time if required by the plaintiff, either to prevent its being interfered with by the waters of the lake in the winter, or for any other reason.

But the defendant insists that by virtue of the deed from Henry, he acquired and now has the right to traverse the beach and make use of it at his will for any purpose including the passing to and from his residence at Orchard Beach.

It may be conceded that the deed confers upon him the right to make the uses of the beach mentioned in the deed from the plaintiff to Henry, whenever he is doing so in connection with or for the purposes of the east half of lot three. And I do not understand the learned trial Judge to have been of a different opinion.

The defendant, in giving his testimony at the trial, admitted that the use he had been making of the beach had no reference to his ownership of the east half of lot three, and that it consisted in going to and from his residence to Main street, and he distinctly claimed that the deed gave him this right.

There is no residence or building on the east half of lot three, and the defendant has been making no use of it for

any purpose. The learned trial Judge in effect held that the defendant was not justified in making the use he was of the beach, and that the deed did not entitle him to do so in the future.

He gave judgment against the defendant, declaring that he had no right of way across the plaintiff's beach otherwise than under the right he might have under the conveyance from Henry, and restraining him from using the way otherwise than under such right.

And unless the conveyance confers upon the defendant the right to use the beach as a way for all purposes and generally at his pleasure, I do not think he can justly complain of the judgment. He can have no higher or better right than his grantor Henry, and a fair way of testing his right is to ascertain if Henry was entitled by virtue of his conveyance to use the beach otherwise than in connection with or for the purposes of lot 3.

I think a fair reading of the conveyance from the plaintiff to him, in the light of the surrounding circumstances, is that it is a grant of liberties or easements for the purposes of and limited to the enjoyment of the lot three. There is, first, the sole right to erect and use upon the beach in front of the lot a private bath and boat house. Then there is the right to use the beach in front of all the lots from one to seven, inclusive, for right of way, bathing, boating, and all other pastimes, in common with the owners of the other lots, subject to the right of each owner of a lot of erecting a private bath and boat house on the beach in front of his lot. Then there is conferred "the full right and liberty for the party of the second part (Henry), his tenants, servants and guests, in common with the other owners, to use all the rights of way shewn on said plan, and a right of way along said beach from east to west, reserving to (the plaintiff) the right to erect fences with gates across said right of way on beach to prevent the public entering thereon."

This language points, in my opinion, to user exclusively in connection with the lots fronted by the beach, by the

Judgment.

Moss,
J.A.

Judgment.

Moss,
J.A.

proprietors of those lots, their tenants and guests, and an intention to exclude any other user, by the public or others, at the will of the grantor.

The beach was plainly intended for the use and enjoyment of the persons occupying the lots, and any other use would be wholly inconsistent with the privacy and seclusion which the grantor desired to secure to those who became purchasers or occupants of his lots. There is manifested a clear intention to keep in the grantor's own hands the power to exclude at his will all persons having no title to make use of the beach, thus protecting the residents from improper intrusion and preserving his own proprietary rights in the premises.

If, as I think, this is the proper construction of the conveyance to Henry, the right conferred on the defendant by Henry's conveyance to him was only to use the beach and way for purposes connected with the east half of lot three, and it does not justify the acts complained of, nor support the claim the defendant sets up to be entitled to use them for all purposes, whether connected with the east half of lot three or not.

It is a question of fact whether the use of a way was a *bonâ fide* exercise of a right of way, or a mere colourable use of it for purposes other than those to which it extended. This was the ruling in the elaborately argued case of *Skull v. Glenister* (1864), 16 C. B. N. S. 81. That case was somewhat canvassed in *Finch v. Great Western R. W. Co.* (1879), 5 Exch. D. 254, but it was not questioned that it rightly decided that if there is a private right of way to one close, it must not be used colourably with the real intention of going to a different though adjoining close. That is recognized as the law, and it is decisive against the defendant in this case. See also *Ackroyd v. Smith* (1850), 10 C. B. 164; *Royal v. Yaxley* (1872), 20 W. R. 903; *Thorpe v. Brumfitt* (1873), L. R. 8 Ch. 650; *Henning v. Burnet* (1852), 8 Exch. 187; *Telfer v. Jacobs* (1888), 16 O. R. 35.

The defendant urged that the learned trial Judge ought

to have made some declaration of the defendant's rights under the conveyance, but it is difficult to see how he could have done more than express in a judgment the language of the conveyance itself. He has sufficiently protected the defendant by saving all his rights under the conveyance, and the defendant is not in jeopardy so long as he limits his acts to such as the conveyance provides for and sanctions.

Judgment.

Moss,
J.A.

The defendant did not counterclaim or ask any cross-relief against the plaintiff founded upon the conveyance, and there seems no good reason why the Court should accord him a declaratory judgment merely, even if he had prayed for it.

I refer to the remarks of Lord Davey in *Barracclough v. Brown*, [1897] A. C. at p. 623.

I think the appeal fails and should be dismissed.

BURTON, C.J.O. :—

I entirely agree with the judgment prepared by my brother Moss. I wish merely to add that I also agree with the learned trial Judge in the view that he was not called upon to deal with the defendant's rights under the deed which he obtained after the commencement of this action.

That deed afforded, of course, no justification of the past trespasses of which the plaintiff complained, and under the old system of pleading, the plea, so far as it attempted to justify the trespasses, would have been held bad on demurrer. If it had granted the right which the defendant claims, of going from his residence on lot two to Main street, it would have been a good answer to the plaintiff's prayer for an injunction, and to that extent only was it necessary for the learned Judge to refer to it; but when it is found that it grants no such right as is claimed, I think the Judge was not only justified in abstaining from pronouncing any judgment upon it, but that that was the proper course to take, especially as the plaintiff objected

Judgment.

BURTON,
C.J.O.

to it. It really had no connection with the matter in controversy in this action between the parties, and I think it would be a most inconvenient construction to place upon sub-sec. 12 of sec. 57 of the Judicature Act, if the Court were called upon to deal with any matter which a defendant might choose to advance in his pleading, where the most the Court could do would be to make a declaration of right without giving any consequential relief: see *Grand Junction Waterworks Co. v. Hampton Urban Council*, [1898] 2 Ch., at p. 345, although quite foreign to the questions in controversy, those questions having been completely and finally determined by the judgment complained of, without prejudice in any way to the rights of the defendant under the deed, as to which apparently there is at present no dispute.

OSLER, MACLENNAN, and LISTER, JJ.A., concurred in dismissing the appeal.

Appeal dismissed.

R. S. C.

ATTORNEY-GENERAL V. CAMERON.

*Revenue—Succession Duty Act—Forum—55 Vict. ch. 6 (O.)—R. S. O.
ch. 24—Practice—Special Case—Declaration of Right.*

When the provincial treasurer and the parties interested do not agree as to the succession duty payable the question must be settled by the tribunal appointed by the Act, namely, the Surrogate Registrar, with the right of appeal given by the Act. The High Court has no jurisdiction to decide the question in a stated case.

The Court of Appeal refused, therefore, to entertain an appeal from the judgments of ROSE, J., 27 O. R. 380, and 28 O. R. 571.

Questions of law which cannot properly arise in, or as incidental to an action, or other proceeding in Court, cannot be made the subject of a special case under Rule 372 in order to obtain the opinion of the Court thereon.

Where a special forum is created by statute for determining rights of parties, a declaration of right will not be made by the Court under sec. 57, sub-sec. (5) of the Judicature Act, in an action which the Court has no jurisdiction to entertain.

THIS was an appeal by the defendants from the judgment of ROSE, J., on a special case stated by the parties, reported 27 O. R. 380, and 28 O. R. 571, and was argued before BURTON, C.J.O., OSLER, MACLENNAN, and MOSS, JJ.A., on the 3rd and 6th of June, 1898. Statement.

Armour, Q.C., for the appellants.

Aylesworth, Q.C., for the respondent.

January 24, 1899. The judgment of the Court was delivered by

OSLER, J.A. :—

It appears to us that we have no jurisdiction to entertain this appeal.

The "statement of the case" simply sets forth that it is an appeal from the judgment of Mr. Justice ROSE delivered in Single Court. Then follows what is described as a "special case," setting forth the facts of the death of the late Alex. Cameron, and the execution of his will and codicils, and the several provisions of these instruments, so far as important, together with the contentions of the several

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J.A.

parties in respect of the succession duty payable on the estate of the testator, and submitting certain questions "for the consideration and opinion of the Court, upon which judgment may be entered." What that judgment is to be, beyond the mere answers to the questions, is not stated or said to be agreed on.

In the report of the case, in 27 O. R. 380, it is said that the special case is stated in an action brought by the Attorney-General of Ontario against the executors of Cameron for the purpose of ascertaining the amount of succession duty payable under the Succession Duty Act, 55 Vict. ch. 6 (O.). The papers in the office of the Registrar of the High Court disclose, what does not appear from the record in the appeal, that the action was commenced in the Chancery Division on the 8th of February, 1895.

Rule 372, which is perhaps not so wide as the corresponding English rule, Ord. XXXIV., Rule 1, provides that the parties may, after the writ of summons has been issued in any action, or in any pending matter not commenced by writ, or in any proceeding incidental to an action, concur in stating the questions of law arising in the action, matter, or proceeding, in the form of a special case for the opinion of the Court.

(2) The parties to a special case may agree in writing that, on the judgment of the Court being given in the affirmative or negative of the question or questions of law raised, certain specific relief may be awarded and the Court may award judgment for such relief accordingly.

No specific relief is here sought or can be awarded. The proceeding is nothing more than an attempt to take the questions submitted out of the jurisdiction to which the Legislature has entrusted the duty of determining them, and to have them decided by a different tribunal and under a different procedure.

The only legislation pertinent to the matters in question, as they were presented in the Court below and before us, is the Succession Duty Act of 1892, which confers jurisdiction to adjudicate thereon upon the surrogate registrar,

with an appeal to the Surrogate Judge, and from him in certain cases to a Judge of the High Court.

I pass over the apparent absence of connection between sections 5 and 8 of the Act, where no appraisement and valuation of the property devolving has been made by the sheriff. It seems to be conceded that it is the duty of the surrogate registrar in all cases in the first instance to assess and fix the duty payable under the Act as best he can.

Then section 9 enacts that any person dissatisfied with the appraisement or assessment (the one perhaps referring to the action of the executors under section 5 and that of the sheriff under sections 6 and 7, and the other to that of the surrogate registrar under section 8) may appeal therefrom to the Surrogate Judge within thirty days after the making and filing of such "assessment," and upon such appeal the Judge shall have jurisdiction to determine all questions of valuation and of the liabilities of the appraised estate, or any part thereof, for such duty, and the decision of the Surrogate Judge shall be final unless the property in respect of which such appeal is taken shall exceed in value the sum of \$10,000, when a further appeal shall lie from the decision of the Surrogate Judge to a Judge of the High Court, whose decision shall be final.

Sections 10, 13 and 18 shew that in other particulars mentioned therein the jurisdiction to deal with questions arising in the administration of the Act, and to enforce payment of the duty, is conferred upon the Surrogate Judge.

It is evident that the questions which this Court is now asked to answer on the appeal from Rose, J., are the very questions which, in a proper proceeding under section 9, must have been determined by the Surrogate Judge, or on an appeal from his decision by a Judge of the High Court, whose decision the Act of 1892 declares shall be final. A later Act gives a further appeal to the Court of Appeal: R. S. O. ch. 24. But even under that Act the appeal must come in a regular course of procedure from the tribunal of

Judgment.

OSLER,
J.A.

Judgment.

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original jurisdiction, and there is no authority under either Act for raising the questions by an action in the High Court. If an action does not lie for such purpose, there is no power under the Rules to submit a special case, as it is only questions of law which must necessarily arise in or as incidental to an action, or in some proceeding properly pending in Court, which can be so submitted: *Republic of Bolivia v. National Bolivian Navigation Co.* (1876), 24 W. R. 361. So under the Common Law Procedure Act it was held that a special case could only be stated in actions without pleading where something was claimed which might be the subject of an action: *Wellesley v. Withers* (1855), 4 E. & B. 750; and see *Pryse v. Pryse* (1872), L. R. 15 Eq. 86.

I have considered whether the proceedings might be supported under sec. 57, sub-sec. 5, of the Judicature Act, R. S. O. ch. 51, which enacts that in every civil cause or matter commenced in the High Court, law and equity shall be administered in the High Court and the Court of Appeal according to the rules following; *inter alia*, that no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and that the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.

Consequential relief is not claimed in the action, and it is difficult to see how any relief or exigible judgment of any kind could have been claimed in it, there being a special forum created by statute in which all demands of the nature in question are to be worked out and enforced. That single circumstance would seem to preclude the application of sec. 57, sub-sec. (5) to such a case. It would seem an extraordinary thing if by a collateral proceeding like this the parties could come to the Court of Appeal, when in the regular course of procedure in the proper forum they are unable to do so. I do not think anything of that kind is contemplated by the Judicature Act. Even if it be said that it is discretionary with the Court to

entertain an action and to make a declaration of right where consequential relief cannot be claimed, this is clearly a case where such a discretion should not be exercised, for the simple reason that a tribunal already exists in which the questions raised can be judicially determined with a limited right of appeal to the High Court. I refer to *Bunnell v. Gordon* (1890), 20 O. R. 281; *Grand Junction Waterworks Co. v. Hampton Urban District Council*, [1898] 2 Ch. 331; and an article by Mr. Bewes in Vol. 8 of the *Law Quarterly Review* (1892).

The case of *Barraclough v. Brown*, [1897] A. C. 615, covers both the points I have adverted to. There, a statute prescribed recourse to a Court of summary jurisdiction to recover certain expenses. Both parties interested wished to obtain a better opinion upon the questions of right and liability and the construction of the statute than they expected to get in the Court prescribed, and an action was accordingly brought in the High Court to recover the expenses. On the argument it was urged that even if the action would not lie for that purpose, the Court could make a declaration that the applicant had a right to recover in the Court of summary jurisdiction. To this Lord Herschell answers that it might be enough to say that no such case was made by the statement of claim. And then he adds: "But, apart from this, I think it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court he can come first to the High Court to have his right to recover—the very matter relegated to the inferior court—determined. Such a proposition was not supported by authority and is, I think, unsound in principle." Lord Watson, after quoting the Act, goes on to say: "The right and the remedy are given *uno flatu*, and the one cannot be dissociated from the other. By these words the Legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable; and has therefore, by plain implication, enacted that no

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other court has any authority to entertain or decide these matters. The objection is one which, in my opinion, it is *pars judicis* to notice, because it arises on the face of the enactment which your Lordships are asked to enforce in this appeal. It cannot be the duty of any Court to pronounce an order when it plainly appears that in doing so the Court would be using a jurisdiction which the Legislature has forbidden it to exercise."

If authority were needed to prove that neither the action nor the appeal is maintainable, we have it in the case just cited and in the subsequent case of *Grand Junction Waterworks Co. v. Hampton Urban District Council*, [1898] 2 Ch. 331, where, singularly enough, the case which had been decided in the House of Lords in the previous year is not noticed.

This case was placed on the paper for judgment some time ago, and stood over at the request of counsel in order to give them an opportunity to cite authority for our giving a judgment in the action. As was to be expected, no such authority is forthcoming; but we have been assured that counsel were aware of the objection we have pointed out, and mentioned it to Mr. Justice Rose on the argument before him, who, nevertheless, entertained the case and gave judgment construing the statute. No doubt this is so, although the learned Judge does not indicate in either of his judgments that the point was present to his mind, nor was it referred to on the argument of the appeal.

The only order to be made is that "this Court doth not think fit to make any order in the matter," and not being a Court of final jurisdiction, we ought to refrain from expressing any opinion upon the merits of the case, as the House of Lords felt at liberty to do in the *Barracough* case.

No order made.

R. S. C.

THE STRATFORD GAS COMPANY V. THE CITY OF STRATFORD.

Contract—Impossibility—Damages.

No action lies for the non-performance of a term of a contract which term is on its face impossible of performance by any of the parties.

Where, therefore, a contract was made by a company for the electric lighting of a city for a named number of nights before a fixed date at a fixed rate per light per night, there not being as many as the named number of nights before that date, and the company did not supply lights the nights that there were, and were not prevented from doing so by the city, it was held that they were not entitled to recover at the contract rate for the named number or for more than the nights actually lighted.

Judgment of STREET, J., affirmed.

THIS was an appeal by the plaintiffs from the judgment of STREET, J. Statement.

The following statement of the facts is taken from the judgment of MOSS, J.A. :—

The controversy in this case arises with reference to two instruments under seal, dealing with the lighting of the city of Stratford by means of electric lights.

The first of these instruments bears date the 22nd of September, 1891, and is between the city of the one part and the Reliance Electric Manufacturing Company of the other part.

The second bears date the 17th of September, 1892, and is between the city of the one part, and the Stratford Gas Company, plaintiffs herein, of the other part.

By the first instrument the Reliance Company became bound to furnish and keep lighted for the city, for three years from the 1st of November, 1891, and on 250 nights of each of the three years, seventy electric lights of 2,000 nominal candle power each, for the price of 20 cents per light each night. And it was further provided that the city or the municipal council, or any committee or committees authorized by the council, should on or before the 1st of November, 1891, select and determine the particular nights during the currency of 1891, and on or before the 1st of January thereafter, and quarterly on or before the

Statement. 1st of January, April, July or October in each year succeeding 1891, select and determine the particular nights on which the lights should be supplied, and vary the nights on certain notice as therein mentioned.

The city, soon after the Reliance Company commenced to render the services under the agreement, became dissatisfied with the manner in which they were being performed, and early in January, 1892, refused to recognize the agreement as in force, and declined to make any further payment under it.

On the 11th of January, 1892, the Reliance Company purported to assign the contract to the plaintiff company, but this was without the consent or recognition of the city. Thereafter the plaintiff company continued to supply lights, but without being expressly directed to do so by the city or council, or any committee of the council, and without receiving any payment, and it was while matters were in this state that the second instrument now sued on was executed.

After reciting the agreement between the city and the Reliance Company, the dispute between them as to its fulfilment, the assignment by the Reliance Company to the plaintiff company and an agreement between the city and the plaintiff company to settle the dispute on the basis therein set forth, and that in other respects the contract with the Reliance Company was to stand good, it provides that the city assents to the transfer of the contract by the Reliance Company to the plaintiff company, and that it is to be considered as if amended by substituting 275 for 250, as the minimum number of nights light to be taken by the city, and the price of 18 cents per light per night.

Then the plaintiff company agrees to duly perform and fulfil, or procure to be performed and fulfilled, all the provisions of the contract as varied, and the city agrees upon the fulfilment of the contract, and as the same is performed from time to time, to pay at the rate of 18 cents per light per night for 275 nights at the time and in the manner specified in the contract, subject to the variations as aforesaid.

The plaintiff company now admits that it has been paid the full quota of nights' lighting for the years 1893 and 1894, but the dispute between the parties arises in this way. Statement.

The plaintiff company says that under the agreement, as amended, the city was bound to select and determine 275 nights in the year 1892, during which the lights were to be supplied, but only 243 or 244 nights were selected, and the plaintiff company claims payment for thirty-one nights at 18 cents per light, or damages for the city's failure to select.

The city, amongst other defences, says that after the making of the new contract it was impossible to select sufficient nights in the year to make up with the nights which had already been lighted, the number of 275, and further that upon the true construction of the two instruments the provision as to 275 nights was only to apply to the future, and that the amendment did not relate back.

The action was tried at Stratford on the 25th of April, 1898, before STREET, J., who gave the following judgment in the defendants' favour :

STREET, J. :—

I think that upon the first consideration of the amended contract it strikes one very forcibly indeed that the amended agreement was intended to apply to the whole period of the contract; that it was intended to extend back, upon the face of it, to the beginning of the contract and to cover the whole period. That is to say that the contract from the beginning was to be read as if it was for 275 nights, and subject to payment of 18 cents a night for each light; but when one comes to ascertain the facts and counts up the dates, then the difficulty of that construction appears, because the agreement was not executed till the 19th of September, and according to the figures we have got it was absolutely impossible for the plaintiffs to have supplied lights for 275 nights during the then

Judgment. current year. The most that would have been possible for
STREET, J. them to have supplied, taking into account the nights upon which they did supply lights, and those which were left, was 260 days, which was fifteen short, and I do not see how in any way I can allow the plaintiffs pay for any more nights than they furnished light upon in accordance with the contract as it now stands. I think that the plaintiffs probably expected that the agreement should relate to the whole period. I think it is very possible that the corporation may have supposed so, but at all events there is nothing to the contrary of that upon the face of the agreement as it stood on the 2nd of August, 1892, when the corporation agreed to it, because then it would have been possible for the plaintiffs to have supplied them with the light for the rest of the current year, and doing so to have made up the tale of 275 nights' light, but there is no evidence upon which I can reform the contract at the instance of either party. I must do the best I can with the contract as it stands, and the parties' rights must be dealt with upon the contract as it stands, and as it stands the plaintiffs are not entitled to recover for any nights upon which they did not light the city, unless they complete the whole amount of 275 nights. They did not do it; it was impossible that they could do it that first year, and as they have already been paid for all the nights they did light the city at the rate of 18 cents, I do not see that I can give them more upon the pleadings. Then it is suggested that during the last year of the contract they were only required to light the city for 270 days, or 271 days perhaps, and that they were entitled to be paid for 275. The answer to that appears to be this, that they made default in lighting the city upon four or five nights of the nights upon which they were required to light it. They did not therefore perform their contract because they did not furnish light on 275 nights upon which they were required to furnish it. The only clause in the contract which entitled them to be paid for nights upon which they did not light the city up to the 275 nights is the last covenant in the

amended contract. There are other covenants in the original contract under which they are entitled to be paid for the nights upon which they did light the city. So that there is nothing, as they have not performed the contract, there is nothing to entitle them to be paid for lighting the city upon nights when, in fact, they did not do so; so that they fail as to their claim to recover during the year ending in October, 1894.

Judgment.
STREET, J.

I think that disposes of all the questions that have been raised, and I think that the plaintiffs' action must be dismissed with costs.

The plaintiffs appealed, and the appeal was argued before BURTON, C.J.O., MACLENNAN, MOSS, and LISTER, J.J.A., on the 29th and 30th of November, 1898.

Woods, Q.C., for the appellants. Taking the agreements as they stand it is plain that the amending contract is intended to relate back to the original contract, and there is no impossibility. If the other reading is the correct one, however, then the city should be held liable to pay for all the remaining nights in 1892 and to make up any deficiency in subsequent years.

Idington, Q.C., for the respondents. The contract on its face is impossible of performance, and the action does not lie: *Clifford v. Watts* (1870), L. R. 5 C. P. 575; *Appleby v. Myers* (1867), L. R. 2 C. P. 651; *McKenna v. McNamee* (1887), 14 A. R. 339.

Woods, in reply.

March 14th, 1899. The judgment of the Court was delivered by

MOSS, J. A. :—

There were claims by both parties for rectification, but at the trial these were not seriously pressed, and the learned trial Judge did not entertain them.

As put by Mr. Woods in his able argument, the whole question now arises upon the construction of the two

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instruments read together, the first being deemed to be amended by the second.

The second instrument bears date the 17th of September, 1892, and is put forward in the statement of claim as an agreement entered into on the 17th of September, 1892. It was in fact executed on the 19th of September, 1892.

There were preliminary writings, but as has been frequently said, where there is a preliminary contract, which is afterwards reduced into a deed, the rights of the parties are entirely governed by the superior document and by the governing parts of that document: *Leggott v. Barrett* (1880), 15 Ch. D., at pp. 309, 310, 311; *Palmer v. Johnson* (1884), 13 Q. B. D., at pp. 356-359.

We must, therefore, deal with it as an agreement taking effect not earlier than the 19th of September, there being no other day named in it from which it is to take effect, and we are not at liberty to look at the preliminary documents.

The result is that on the day of its execution the agreement thereby made was impossible of performance as regards the supply of lights for 275 nights within the remainder of the current year.

The plaintiff company had supplied lights for a certain number of nights up to that time, but adding to them all the nights left of the current year the total could not amount to 275.

The plaintiff company did not attempt to supply lights for every remaining night, but contented itself with supplying them on the nights selected, and it has been paid for all the nights on which it furnished lights. The claim is to be paid for nights on which it did not furnish lights, and it is urged that although it is true that it was impossible for the company to supply for 275 nights, yet it should be paid as if it had done so.

No doubt, as said by Willes, J., in *Clifford v. Watts* (1870), L. R. 5 C. P., at p. 585, cases may be conceived in which a man may undertake to do that which is impossible, and yet he may still be bound by his agreement. He adds, however, that before we arrive at such a conclu-

sion, we must be satisfied, if no other reasonable construction suggests itself, that the party really did intend to warrant that to be possible which was impossible.

Judgment.

Moss,
J. A.

I do not see in this case how one party can be taken to be warranting more than the other. If there was an intention to warrant that it was possible to give the supply for 275 nights in the current year, although it was plainly impossible to provide that number of nights out of the calendar, the plaintiff company must be taken to have warranted that it could do it, and would fulfil the contract in that respect.

The city's obligation to pay is expressly based upon the fulfilment of the contract, and as the same is performed from time to time.

And as this part of the contract was not performed, and could not be wholly performed, by the plaintiff company it cannot claim payment as if it was performed.

It was urged that it was the city's duty to select nights, and that only a certain number of nights was selected after the 19th of September, and that therefore there was default by the city preventing the fulfilment of the contract by the plaintiff company. But as all the remaining nights, and more, would be required, on the plaintiffs' construction, to complete the fulfilment, there was no selection possible.

The plaintiff company was at liberty, if it wished, and was of the opinion that the contract called for it, to supply the lights for all the remaining nights of the current year.

Having refrained from doing this it can scarcely be heard to complain of the want of selection. It does not appear that it was forbidden or prevented from supplying lights upon the other nights.

There are other difficulties in the plaintiffs' way which were discussed on the argument, but it is not necessary to deal with them.

The judgment should be affirmed with costs.

Appeal dismissed.

R. S. C.

JAMIESON v. THE LONDON AND CANADIAN LOAN AND
AGENCY COMPANY (No. 2).

Landlord and Tenant—Lease—Assignment—Mortgage—Discharge.

It having been held in a former action between the parties (27 S. C. R. 435) that the defendants were, under the assignment of lease by way of mortgage there in question, assignees of the term and liable on the covenants in the lease contained, it was now

Held, that they were entitled to execute a statutory discharge of the mortgage, and thus put an end to their liability, the assignment to them having been made, with the lessor's consent, for a limited purpose.

Judgment of FALCONBRIDGE, J., reversed.

Statement. THIS was an appeal by the defendants from the judgment of FALCONBRIDGE, J.

The plaintiff, being the owner of certain premises in the city of Toronto, leased them to one J. R. Armstrong, by lease dated the 1st of January, 1889, for a term of twenty-one years. The lease purported to be made in pursuance of the Act respecting Short Forms of Leases, and contained, among other covenants, a covenant by the lessor for perpetual renewal at a rental to be fixed by arbitration, and a covenant by the lessee, for himself, his executors, administrators and assigns, not to assign, set over, or sublet to any person without the consent in writing of the lessor, unless such consent should be unreasonably upheld, any question as to the reasonableness of the refusal to be settled by arbitration. In March, 1889, and February, 1891, Armstrong made mortgages in favour of the defendants, and to each mortgage the plaintiff gave his assent in the following terms: "I, Philip Jamieson, the lessor named in the within mortgage, do hereby consent to the within mortgage of lease by way of assignment by James Rogers Armstrong to the London and Canadian Loan and Agency Company, Limited." In each mortgage there were special powers of sale and a proviso that the mortgagees might release any parts of the land at any time. The defendants subsequently took possession of the mortgaged premises, and in litigation which took place between them

and the plaintiff, were declared to be assignees of the term and liable on the covenants. (See 23 A. R. 602; 27 S. C. R. 435.) Armstrong made an assignment for the benefit of his creditors in September, 1891, his equity of redemption in the leasehold premises being specifically included, the plaintiff not assenting, and died intestate and insolvent in May, 1896, and no administrator or personal representative of his estate had been appointed. His assignees remained in possession of the premises for some months, and in December, 1897, assigned, without the plaintiff's assent, to a man of straw. After the decision of the Supreme Court in the former case the defendants arranged with Armstrong's next of kin to accept discharges of the mortgages, and prepared discharges of mortgage in the usual statutory form, dated the 10th of June, 1897, certifying that James Rogers Armstrong had satisfied all money due or to grow due on a certain mortgage, etc., and the plaintiff brought this action for an injunction to restrain them from executing and registering these discharges. An interim injunction was granted by FALCONBRIDGE, J., and at the trial before the same learned Judge it was made perpetual, his judgment being as follows :

FALCONBRIDGE, J. :—

This case was argued before me at great length and with much ingenuity and ability. The facts are not in dispute; and, without reference to the hardship of the case on one side or the other, it is simply a question of law; and as the case is likely to go further, and will not probably end short of the highest Court in the Dominion, if not of the Realm—it is desirable that judgment should be given speedily. In view of the exhaustive argument of counsel and with reference to the principle laid down by the authorities cited, I may as well give expression to the opinion I have formed. Notwithstanding the ingenious argument advanced by counsel for the defence I am still of the opinion which I entertained on

Judgment. the hearing of the motion for the interim injunction, that
Falconbridge, this effort on the part of the defendants to discharge the
J. mortgages held by them is an indirect way of endeavouring to assign the lease, without leave, to an irresponsible and perhaps unascertainable party; and that therefore it is within the purview of the covenant not to assign or sublet without leave. I think the case of *Munro v. Waller* (1896), 28 O. R. 29, which was cited to me by the learned counsel for the plaintiff, is in point; and its application to the judgment of the Supreme Court in the first case between these same parties is conclusive in this case.

I am not called upon to say whether consent is reasonably or unreasonably withheld by the plaintiff here. The parties have provided *forum domesticum* for the determination of that question. True it is the defendants might have taken the course of assigning, without leave, and then allowing it to be determined by action of damages or otherwise whether the consent of the plaintiff, if it was actually demanded and withheld, was unreasonably withheld; but they have not taken that course; and it is admitted that in the position the parties now find themselves injunction is the proper remedy for the plaintiff, if he is entitled to any remedy.

I think good reasons have been assigned for the action of the plaintiff, even if we take by way of illustration the clause in the mortgage for releases, to which it was argued the plaintiff had given his assent as well as to every other part of the mortgage.

With reference to the effect of the clause for repayment revesting the estate on payment, there is no doubt if payment had been made *ad diem* the security would have been voided *ipso facto*, and the plaintiff would therefore not then be in a position to object to the discharge of the mortgage, for to that he had assented.

On the whole, I think the plaintiff entitled to succeed. Judgment will therefore be for the plaintiff, in terms of the prayer of the statement of claim, with costs of action, including costs of motion for injunction.

The appeal was argued before BURTON, C. J. O., OSLER, *Argument.* MACLENNAN, MOSS, and LISTER, JJ. A., on the 5th and 6th of December, 1898.

Robinson, Q.C., and *Arnoldi*, Q.C., for the appellants. The plaintiff has no interest in the moneys secured by the mortgages to the defendants, and has no right to dictate the terms upon which the defendants are entitled to discharge them. He by his consents to the terms of the mortgages in question became bound thereby to all intents and purposes and he must be treated as if he had assented to the defeasible assignment to the mortgagees, and to the limited estate of the mortgagees in the mortgaged premises, and to the right of the defendants to treat the mortgages as satisfied at any time and to discharge them or to release the mortgaged premises and to divest themselves of all estate and interest therein, when they thought proper so to do. There can be no distinction between the case of the mortgagees being paid their debt in full, and that of their being entitled to no further payment in respect thereof, by being in receipt of rents or by any other circumstances entitling the owner of the equity of redemption to be freed from the mortgages. The lessor would not be a necessary party to an action for redemption in any of these cases, and for the same reason has no right to interfere, as he claims to do in this suit. The plaintiff cannot deny the right of the mortgagor or his assigns to have the estate back, and therefore he cannot deny the right of the mortgagees to give it back. The plaintiff must shew that he is entitled to compel the mortgagees to retain the mortgaged estate forever. Nothing short of this will sustain his contention in this action, and such a claim is in direct contradiction of the terms of the mortgages to which he is a party by his consents. The mortgages in question contain an express provision to which the plaintiff has assented, under which the defendants are entitled to release from time to time the mortgaged leaseholds or any part thereof. The technical form of such release is unimpor-

Argument. tant, whether by statutory discharge or otherwise. The defendants may release the premises in part from time to time, or all at one time. The request of those entitled to redeem, or of covenantors in the mortgage, will be presumed, if such request be necessary. The mortgages also contain an express power to sell, assign and convey on such terms as the defendants think proper, and the plaintiff has assented to this power also. The plaintiff has acted and is acting unreasonably in resisting the desire of the defendants to determine their estate in the leasehold premises.

Aylesworth, Q.C., and *W. H. Irving*, for the respondent. The defendants are assignees of the lease, and they are not assignees in a qualified sense nor assignees conditionally, but the assignment to them is absolute: *Williams v. Bosanquet* (1819), 1 Brod. & Bing. at p. 262. The Court will not now recognize any distinction between an assignee holding the estate as mortgagee and an assignee holding absolutely: *Platt's Law of Covenants*, p. 488. It is submitted that the defendants are in reality attempting to draw the very distinction between their mortgage and any other assignment which the Courts in overruling *Eaton v. Jaques* (1780), 2 Doug. 455, and similar decisions, have determined not to exist, and being assignees and bound by the covenants in the lease the Court will not assist them to escape this responsibility: *Woodfall's Landlord & Tenant*, 15th ed., p. 275. The defendants claim the right in effect and in fact to assign the lease, but being assignees of the lease and bound by the covenant not to assign without leave the plaintiff's leave is necessary, unless it is being withheld unreasonably. It is not disputed that the result of what the appellants claim the right to do, would have been to vest the lease in *Armstrong's* assignees, who as the evidence shews did not want it and would not accept it, and it is also not disputed, that by the assignment executed by the assignees after the action was begun, the result would now be to vest the lease in an unknown person, admittedly a mere "man of

straw." If the defendants' contention be upheld they are entitled to force upon the plaintiff without his consent and against his protest, as his tenant, a person whom neither he nor the defendants know anything of, admittedly worthless, and who may refuse to accept the lease when offered to him by the defendants. It is a mistake to say that the defendants' position as between themselves and the plaintiff is governed at all by the mortgages or that their liability is measured or limited by anything therein contained. The operation of the mortgages is to make the defendants assignees of the lease, and their consequent liability is referable wholly to the lease. They are liable not as mortgagees under the mortgage but as assignees under the lease. The consents endorsed upon the mortgages had not the effect contended for. The plaintiff had no right to refuse the consent asked of him, and this consent must not be strained so as to cover anything more than the particular act to which the consent was necessary, namely, the act of Armstrong in executing and delivering the assignment, and it was not a consent, given in anticipation, to some future act of the assignees. The defendants' contention is that the consent to the mortgage enables them to do, as against the plaintiff, any act which by virtue of the mortgage they can do as against Armstrong or his representatives, and that the plaintiff is by reason of his consent bound to recognize the defendants in their character of mortgagees. In their character as assignees, the defendants are bound by the covenants to pay the rent and taxes, and not to assign without leave. In their character as mortgagees they are not bound to perform either covenant. Their argument is that they are freed from any obligation to perform the covenant not to assign without leave. By the same argument they would also be free from any obligation to pay rent and taxes, but the judgment of the Supreme Court is directly opposed to this contention. The question of the power to sell does not arise, and the proviso as to releasing can have no effect after possession has been taken. The plaintiff's consent has

Argument.

Argument. been reasonably withheld: *Treloar v. Bigge* (1874), 22 W. R. 843.

Robinson, in reply. It is significant that the passage cited from Woodfall does not appear in the 16th edition.

March 14th, 1899. BURTON, C. J. O.:—

It having been decided by the Supreme Court that the assignment of the lease to the defendants by way of mortgage was of the whole term, it follows that until re-assignment the defendants are liable upon the covenants in the lease which were binding on the lessee, and it is not the less absolute because by agreement between them and their assignor it was stipulated that the assignor should be at liberty in a given event, which might or might not happen, to entitle himself to a reconveyance by payment of the money borrowed.

The consequences were serious enough arising from a mere slip of an attorney's clerk in preparing the assignment, and the defendants now seek to repair the loss, to a certain extent, by foregoing their debt against their assignor and reconveying the property to him, but the plaintiff contends that they are not at liberty to do this without his consent and relies upon a passage in the 15th edition of Woodfall in support of it.

It is to be remarked that in the 16th edition this statement is not continued, but it and the cases cited in support of it are dropped out.

One of these, *Anon* (1701), 2 Freem. Ch. 253, is very shortly reported, but I do not think that in the face of such decisions as *Moore v. Choat* (1839), 8 Sim. 508, that authority would be followed at the present day, and the other case, *Sparkes v. Smith* (1692), 2 Vern. 275, does not support the plaintiff's contention. In the case of *Lucas v. Commerford* (1790), 3 Bro. C. C. 166, the Court did not, as in the case in Freeman, make a decree direct for specific performance but the defendant being an equitable mortgagee only, directed that he should execute a legal mortgage.

That judgment was much discussed in *Moores v. Choat*. A deposit of a deed for securing a debt, it was said, is only a contract for a mortgage, and a mortgage of a lease is always made by experienced persons not by assignment but in the form of an underlease, and it is made in that form for the express purpose of protecting the mortgagee from being liable to the landlord under the covenants in the original lease. What pretence then was there for compelling the depository to take an assignment of the lease.

Judgment.
BURTON,
C.J.O.

The case is not very fully reported, but admission of liability by the defendants on the other covenants in the lease seems to have influenced the decision.

But an attempt is now made to extend and enlarge the liability of the defendants to an alarming extent, in fact to make them liable for rent and taxes and the performance of all the covenants until the expiry of the term. True, the plaintiff says, I knew of the mortgage and consented to the transfer on the condition that its terms would be strictly carried out, and the payment *ad diem* alone would have made the mortgage void and entitled the mortgagor to a re-conveyance; I assumed that would be so and upon that assumption gave my consent. So that according to this contention if the mortgagor had gone to the mortgagees prepared to pay off the mortgage on the following day, and had so paid it the mortgagees could not assign the property back to the mortgagor without the plaintiff's consent.

The mere statement carries with it, it seems to me, its own answer. The law I should hope is not so unreasonable, and if so, why should the mortgagees not be entitled to waive their claim to payment, or without such waiver, if they find the security burdensome or for any other reason, to give to their assignor the usual statutory discharge?

Both parties, mortgagees and mortgagor, being willing to do this, upon what principle is the landlord entitled to interfere?

If the mortgagees from being under obligation to the

Judgment.

BURTON,
C.J.O.

mortgagor for some act of kindness or other cause chose at any time to discharge their mortgage without further payment during its currency it would be a strange thing if the plaintiff could have prevented it, and I can see no difference in principle.

When the lessor consented to the assignment with the knowledge that it was to secure a mortgage debt he was bound in my opinion by all the terms of the mortgage to all intents and purposes, and must be treated as bound by all the conditions and incidents of the mortgage, and of the estate and interest of the mortgagees therein, and by the operation of law in respect of the same, and among these was a power of sale in the event of default. Can it be plausibly urged that if in good faith the property had been sold to a *bonâ fide* purchaser the defendants would have been unable to carry out the sale by a conveyance to the purchaser without the consent of the lessor? I cannot believe the law to be in so unsatisfactory a state and decline to hold so in the absence of authority binding upon me.

I think the appeal must be allowed with costs and the injunction dissolved.

MACLENNAN, J.A. :—

It is now well settled, and was not disputed in argument, that a mortgagee of a term, where the whole term has been assigned to him, is liable on the covenants contained in the lease to the same extent as a purchaser of the term would be. It is also clear that the assignee of a term, in the absence of a covenant against assignment by which he is bound, may relieve himself from liability for future breaches of covenant by assigning it to any other person, even to a pauper: *Spencer's Case*, 1 Sm. L. C., 10th ed., at p. 70; *Woodfall's Landlord & Tenant*, 16th ed., p. 269 *et seq.*, and cases there cited.

The present lease, however, contained a covenant by the lessee, for himself, his executors, administrators and assigns,

not to assign or sublet without leave, and it has been settled that such a covenant is binding on the assigns of the lessee and runs with the land: *Spencer's Case*, 1 Sm. L. C., 10th ed., at pp. 65, 69; *Williams v. Earle* (1868), L. R. 3 Q. B. 739; Woodfall's Landlord & Tenant, 16th ed., p. 174; and by R. S. O. (1887) ch. 143, sec. 12, such a covenant is not exhausted by the giving of one license, as was formerly the case: *Dumpro's Case*, 1 Sm. L. C., 10th ed., p. 31.

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It is not necessary for us to consider or decide what the effect would be of a mere consent by the lessor to an assignment of this lease, simpliciter, without reference to the object or purpose of the assignment, for the present is not a case of that kind. It is not a bald consent to an assignment of the term, but a consent "to the within mortgage," that is, to the very instrument which was executed by the lessee. The action was commenced on the 29th of June, 1897, and an interim injunction, with the usual undertaking as to damages, was obtained from my brother Falconbridge, which was afterwards continued to the hearing, when it was made perpetual. The judgment restrains the defendants, without the consent of the plaintiff (unless unreasonably withheld), from assigning the lease, and also from executing or delivering any statutory discharges.

The appellants must succeed or fail upon the proper construction of the consent signed by the plaintiff. Armstrong was desirous of assuming the relation of a mortgagor of the term to the appellants, and the appellants were desirous of assuming the relation of mortgagees. They could not do so without the plaintiff's consent, by reason of the covenant which had been entered into by Armstrong, and by which both Armstrong and the defendants would be bound, unless they got the plaintiff's consent. They accordingly applied to the plaintiff and obtained the consent in question. What they required was a consent which would enable them to exercise with freedom all their rights as mortgagor and mortgagees respectively in relation to the lease, and the question is

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whether the consent which they obtained is sufficient for that purpose. I think it is. To say that he consents to this mortgage necessarily means that he consents not merely to the assignment of the term, but to all the provisos, stipulations, conditions and covenants therein contained. One proviso is that upon repayment of the loan and interest, on certain days, the mortgage should be void. Another is that in case of default the mortgagees might sell or lease, and a third, that the mortgagees might release or discharge any part of the premises at any time at the request of the mortgagor, etc. Among the covenants is one for payment of the debt, so that if it was not paid *ad diem* the mortgagees could nevertheless compel payment. I think it would be a very extraordinary construction of the consent to say that if the money was paid on the day, whereby the term which had been assigned to the defendants became revested in Armstrong, the defendants would be liable to an action on the covenant not to assign without leave, by which as assigns they were admittedly bound; and yet that must be the result unless the plaintiff's consent extends to the proviso, for it is by virtue of the proviso alone, which is nothing more than an agreement entered into by the mortgagees with the mortgagor, that upon payment the revesting of the term would take place. To me, indeed, it appears too clear for argument, that the plaintiff's consent extends to the proviso, or stipulation, that in the event of payment *ad diem* the term should revest in the mortgagor. If that is so, it is decisive of this appeal in favour of the appellants. If the plaintiff's consent to the mortgage extends to all the express stipulations therein contained, it must equally extend to all those rights and obligations of the parties against and towards each other, in other words, to all their reciprocal rights and obligations, legal and equitable, which are implied by law. Some of these are the rights of foreclosure and redemption, the right to settle and adjust the mortgage debt, and to agree upon the terms of redemption and foreclosure respectively. There can be no doubt

either that a mortgagee can, if he choose, release his debt altogether, without payment, and even without the consent of the debtor, on the principle of the maxim: *Quilibet potest renunciare juri pro se introducto*: Broom's Maxims, 6th ed., p. 655. Judgment.
MACLENNAN,
J.A.

So also, in my opinion, there can be no doubt that a mortgagee of a term, burdened with rents and taxes, is entitled to be indemnified against such burdens by his mortgagor, and, if necessary, to compel him to take a reassignment for the very purpose of being relieved from them, and that even without receiving payment, or releasing the debt. In the present case the debtor has made great default, the mortgagees have been obliged to pay great sums for rent and taxes, and as against the mortgagor and his representatives they are not only entitled to indemnity, but to be relieved from further liability by discharging the mortgage, even without their consent. If they should object, and there was no other way, the Court would, by its judgment, revest the term by a vesting order. I see no reason why the defendants may not avail themselves of the means of effecting their object afforded by the section of the Registry Act relating to discharges of mortgage.

It was also argued that there was no difference between an assignment, or discharge, which would revest the term in the mortgagor, and an assignment of the mortgage to a third person, and that if the latter could not be done without a new consent, neither could the former. But that is not so. There is a clear difference between the two cases. The right to make, and even to insist upon making, a reconveyance to the mortgagor or his representatives, arises out of the mortgage itself, which is an agreement to which the lessor has already given his consent; while an assignment to a third person is not made by virtue of anything in the mortgage deed, but the power to do so is a legal incident of that kind of property, and can only be done in pursuance of a new and independent agreement between the assignor and the intended assignee, for which the lessor's consent must be obtained.

Judgment.

MACLENNAN,
J.A.

In my opinion, the appeal should be allowed and the action should be dismissed with costs.

The defendants, however, are entitled to an enquiry as to damages sustained by the injunction ; and inasmuch as there may be a claim for breaches of covenant committed before the granting of the injunction, for which the defendants are liable to the plaintiff, the parties may perhaps think it convenient to have a reference, which will cover all questions of damages and accounts between them. If so, I think such a reference might be made in this action, instead of commencing a new one.

Moss, J. A. :—

For the purposes of this appeal it must be conceded that the defendants are, by virtue of the instruments of mortgage from J. R. Armstrong to them referred to in the pleadings and evidence, assignees of the term created by the instrument of lease from the plaintiff to Armstrong, also referred to.

But it does not necessarily follow that the defendants are not now entitled to divest themselves of the term by rendering it back to the mortgagor or his representatives, even though the plaintiff may withhold his consent.

It must be admitted that there was a time since the creation of the mortgages during which the defendants might have rendered back the term to the mortgagor without consulting the plaintiff. The plaintiff's contention is that the time during which the defendants might have taken that course without his consent has passed.

The defendants on the other hand contend that they are still in a position to do so, and they rely upon the nature of the transaction between them and Armstrong and the terms of the consents given by the plaintiff.

The transaction, so far as Armstrong was concerned, was the ordinary and usual one of an advance of money by a loan company to him to be repaid with interest and in the meantime to be secured by mortgage upon the borrower's estate or interest in the leasehold premises in question.

Mortgages were prepared and executed containing the usual covenants and provisions where the security is upon leasehold property.

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J.A.

The relationship of mortgagor and mortgagees was expressly created, and as against Armstrong and his representatives the defendants took and held their claim to the property as mortgagees only.

The plaintiff expressly consented to the mortgages by a memorandum endorsed on each of them.

He thus recognized the instruments as mortgages made by Armstrong to the defendants of the lease. And although mortgages by way of assignment, yet mortgages only and not assignments of the whole of Armstrong's estate and interest in the leasehold premises.

They were assignments of the whole term, but they reserved to Armstrong the interest of a mortgagor in the mortgaged premises.

The plaintiff agreed to the defendants' position, and expressed his willingness that they should become assignees of the term as mortgagees. That surely meant mortgagees with all the incidents of that position.

The defendants did not assume any other position towards Armstrong or his representatives than that of mortgagees, and to that the plaintiff agreed.

So far as Armstrong or his representatives are concerned they would not lose their right to insist upon the mortgagor's ordinary rights according to the mortgages, even though they were in default, and to that incident of a mortgage the plaintiff agreed.

In short he agreed to the mortgages with all the incidents attaching to such securities.

It is perfectly true that as long as the defendants continue to hold the premises under the instruments of mortgage the plaintiff is justified in treating them as the assignees of the term and in requiring of them performance of such of the covenants as fall to be performed by an assignee of a term during his continuance as such.

But they are assignees *sub modo* and there is nothing in

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the mortgages, or, as I think, in the law compelling them to continue as mortgagees.

I think they are at liberty, acting in good faith, to give up their security and restore the term to their mortgagor or his representatives at any time while the relationship of mortgagees and mortgagor continues to exist between them.

I see no reason why a mortgagee may not if he chooses release to his mortgagor the security of the property comprised in the mortgage, still retaining his personal claim as a creditor who has loaned money.

It may be that a mortgagee in possession is not entitled to cast back the estate upon his mortgagor without his consent, though with his consent there is nothing to prevent it.

But I apprehend it is undoubtedly an incident of every mortgage security that the mortgagee may, if he chooses, release his debt and restore to the mortgagor his estate. Is the plaintiff after having consented to the mortgages in question in a position to object that his consent is necessary to such a proceeding on the part of the mortgagees?

True, the Courts have not been willing to relieve mortgagees of leasehold from the consequences of their having taken assignments instead of underleases, and they have held them to the consequences of that proceeding whether they have or have not entered into possession of the mortgaged premises. But they do not appear to have gone the length of depriving mortgagees of any of the rights usually attendant upon the position.

In *Williams v. Bosanquet* (1819), 1 Brod. & Bing. 238, in which was finally settled the much mooted question of whether a mortgagee by assignment of leasehold could be rendered liable on the lessor's covenants unless he had entered into possession, the Court used language which seemed to indicate the view that the liability continued only while the relationship of mortgagor and mortgagee lasted. Dallas, C.J., said (p. 262): "The whole interest

is therefore assigned, and the whole is to be reassigned. It vests then absolutely, till such re-assignment, in the party who is to re-assign and is not less absolute because, by agreement between the immediate parties, to which the lessor is no party, the assignor may, in an event which may or may not happen, entitle himself to a re-conveyance by the money being repaid."

In the present case the lessor is a party and agrees to the terms of the mortgage, and therefore to the terms, whether legal or equitable, upon which the mortgagor and mortgagees may as such deal with one another.

It is true that Dallas, C.J., afterwards refers to the assignment having in that case become absolute, but that was at law, and no doubt the fact aided the argument against the mortgagee in that particular case.

But that does not at all shake the rule which preserves to the mortgagor and those claiming under him the equity of redemption and all that the equity of redemption implies.

In Woodfall's Landlord & Tenant, 15th ed., at p. 275, there occurs a statement to the effect that "if [a mortgagee of leasehold] becomes assignee, equity will not afford him any relief though he may offer to forego his charge and lose his money."

For this proposition three old cases are cited, which upon examination do not, as I think, bear out the statement.

In *Anon* (1701), 2 Freem. Ch. 253, the defendant was mortgagee by assignment from the lessee of leasehold premises containing a covenant by the lessee to build. The latter died insolvent not having built and on bill filed against the mortgagee to compel him to build, Lord Keeper Wright decreed that he should "so that he could not quit the lease though he would be content to lose his money." This was the decision of a not very strong Judge and is not in harmony with *Sparkes v. Smith* (1692), 2 Vern. 275 (the next case cited in Woodfall, 15th ed.), where the Court, while recognizing the liability the mortgagee was under, expressly declined to assist the lessor.

In *Casberd v. Attorney-General* (1819), 6 Price 411, the question was not before the Court, and only incidentally

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was the point discussed whether a mortgagee by deposit of a lease stood on the same footing as to liability for lessees' covenants as a mortgagee by assignment by deed.

But no one of these cases goes further than to lay down, what need not be disputed, that the mortgagee cannot escape liability for breaches of covenants occurring during the time he is assignee by offering to forego his security. And it is probably for the reason that it was considered that the statement was too wide that it is not repeated in the 16th edition of Woodfall.

No injustice is done the plaintiff by restoring the term to the mortgagor. For any breach of the covenants up to that time the defendants would continue liable to the plaintiff. And the restoration of the term was something that must reasonably have been in the contemplation of all parties when the mortgages were created and the consents given.

But for the changed financial conditions, the objection the plaintiff is now making would never in all probability have been made.

But the defendants did not agree or undertake that they would not restore or attempt to restore the mortgaged premises without the plaintiff's consent, in case of the mortgagor's financial failure.

It is urged for the plaintiff that the equity of redemption is vested in others than the mortgagor's personal representatives. The assignments subsequent to the defendants' mortgages do not appear to have been consented to by the plaintiff and do not prejudice him.

And the effect of what the defendants propose to do is nothing more than to vest the term in the proper party or parties now representing the mortgagor in interest.

In my opinion, there should be judgment allowing the appeal.

OSLER, and LISTER, JJ.A., concurred in allowing the appeal.

Appeal allowed.

R. S. C.

GOOD V. THE TORONTO HAMILTON AND BUFFALO
RAILWAY COMPANY.

Contract—Conditions—Reference to Engineer.

The rule that a contractor is bound by a condition in his contract making the employer's engineer the interpreter of the contract and the arbiter of all disputes arising under it, does not extend to a case where the named engineer, while in fact the engineer of the employer, is described in the contract as, and is supposed by the contractor to be, the engineer of a third person.

Judgment of ARMOUR, C.J., affirmed.

THIS was an appeal by the defendants the Dominion Construction Company and E. B. Wingate, from the judgment of ARMOUR, C. J. Statement.

The Dominion Construction Company were the contractors for the construction of the line of railway of the Toronto Hamilton and Buffalo R. W. Co., and the plaintiffs were sub-contractors for the construction of part of the railway. They claimed in this action payment by the Dominion Construction Company of \$108,391.26 alleged to be due to them under their sub-contract, a declaration as against Wingate that he was disqualified from acting as certifying engineer under their sub-contract, though named therein for that purpose, and an injunction as against the Toronto Hamilton and Buffalo R. W. Co., to restrain them from paying the Dominion Construction Company until the plaintiffs' claim was adjusted.

The following detailed statement of the facts is taken from the judgment of OSLER, J. A.:—

The defendants, the Toronto Hamilton and Buffalo R. W. Co., were incorporated some years prior to the year 1889, for the purpose of constructing a railway, part of the main line of which was from Brantford to Welland, passing through the city of Hamilton. Soon afterwards a construction company, incorporated in the State of Illinois under the name of J. N. Young & Co., was organized for the purpose of building the road, one J. N. Young being the chief promoter of the concern.

Statement. J. N. Young & Co. became the owners of, or took up the greater part of the stock of, the railway company, putting up the 10 per cent. required to be paid before its organization, and they created the local board of directors, qualifying the individuals who composed it by giving them the necessary shares.

They then entered into a contract, on the 2nd June, 1891, with the railway company through the medium of this board of directors for the construction of the line of railway or part of it. Into the particulars of this contract it is not necessary to enter, inasmuch as the financial operations of that corporation being unsuccessful they were unable to carry it out, and thereupon Young procured a new company, the defendants the Dominion Construction Company, to be incorporated under the laws of New Jersey, which acquired the rights and interests of the old one under their contract with the railway company, and succeeded in building the line. The new company, on the 4th of September, 1894, entered into a contract with the railway company, the directors of which stood in the same position towards them as they did to the former, by which for a bulk sum of \$35,000 per mile they agreed to survey, locate and construct the railway company's line of railway and telegraph from its present terminus east of Brantford to and through the city of Hamilton to a connection with the Canada Southern Railway at or near Welland, and from a connection with that railway at Hamilton to Toronto. They also agreed to construct a second main track between the latter points, if required, at a bulk sum of \$20,000 per mile. The railway was to be constructed on such line as the chief engineer of the railway company should locate and adopt, and in accordance with the specifications attached to and forming part of the contract. The provisions of the contract for securing payment of the contract price need not be referred to further than to say that the whole of the assets of the railway company of every kind then owned or thereafter to be acquired were pledged and to be secured for that purpose in the manner

set forth in this contract. It was stipulated that the railway company should appoint a chief engineer who should have entire charge of the engineering department of the railway company. His decision upon all questions that might arise in connection with the contract as to its true meaning and intent so far as the work of construction was concerned was to be final and binding on all parties, and his salary and compensation were to be paid by the construction company. It was provided that the construction company should have the right by its president, general manager, or any director, of being present at any directors' meeting of the railway company, and to discuss any resolution or motion before the meeting. Statement.

On the 10th of July, 1895, the contract between the Dominion Construction Company and Good & Co., the plaintiffs, out of which the present litigation arises, was entered into. By it Good & Co. covenanted to build the eastern branch of the railway, viz., that part of the line between Hamilton and Welland, and to complete it "to the satisfaction and acceptance of the chief engineer of the Toronto, Hamilton and Buffalo R. W. Co." The company covenanted to pay them for the work in accordance with the scheduled prices specified in the contract. Progress estimates, "to be judged of by the said chief engineer," were to be presented at the end of each month, and 90 per cent. thereof to be paid by the 20th of the following month. "And when all the work embraced in this contract is fully completed agreeably to the specifications and in accordance with the direction, and to the satisfaction and acceptance, of the said chief engineer, there shall be a final estimate made of the character, quality and value of the work according to the terms of this agreement, when the balance appearing due to Good & Co. shall be paid to them within thirty days thereafter upon their giving a release in full to the company of all claims arising in any manner out of the agreement, and upon their procuring and delivering to the company full releases from mechanics, material men, etc., for work done and materials supplied

Statement. under the contract." The procuring of such release was to be a condition precedent to the right of Good & Co. to payment.

Good & Co. agreed not to sublet or transfer the contract or any part of it without the written consent of the chief engineer. By a further clause it was provided that the decision of the chief engineer was to be final and conclusive in any dispute which might arise between the parties relative to or touching the agreement, each party reserving any right of action by virtue of the covenants, so that the decision of the chief engineer should, in the nature of an award, be final and conclusive.

The plaintiffs proceeded with their contract, and it was, within what may be called a reasonably short time after the date fixed for its completion, finished to the satisfaction and acceptance of the chief engineer of the railway company. The plaintiffs were by consent relieved of some part of the work of ballasting the line, and no question arises about that. The road was also accepted by the engineer as completed as between the construction company and the railway. But when it came to the question of procuring the final estimate required by the plaintiffs' contract difficulties arose respecting the classification of certain portions of the work which the plaintiffs contended should be classified as loose rock, for which the engineer was prepared to allow no more than about 98 M cubic yards, while the plaintiffs claimed 150 M. The difference between the two figures the engineer thought should be classified as earth excavation only, although in his original estimate for the purpose of the contract he had put the whole at the large figure which the plaintiffs asserted had been found as a matter of actual work on the ground as shewn on the progress estimates to be nearly right. There were also differences between the parties as to the plaintiffs' claim for extras, and in respect of a claim for what is described in the specifications as the "force" account—differences which by the terms of the contract were doubtless required to be decided by the engineer, but which the parties endeav-

oured, but without success, to settle between themselves after the contract had been completed and the works accepted by him. Statement.

On the 17th of March, 1896, the engineer gave the plaintiffs a qualified or conditional final estimate as to quantities and character of the work, but not "moneyed out," and upon the understanding, as he stated in his letter accompanying it, "that an amicable settlement is made between Good & Co. and the construction company upon items under consideration," *i.e.*, the extras and force account. It was not intended as a final estimate upon which the plaintiffs could obtain judgment, and on their part they were not prepared to accept it because of the alleged improper classification. With regard to this classification the plaintiffs' contention was that the chief engineer had never, by actual inspection of the ground while the work was being proceeded with, acquired a knowledge of the ground and of the character of the work, which justified him in making, in the final estimate, so radical a change in the classification which had from time to time been made in respect of it in the progress estimates based on the reports of the sub-engineers who saw the work while it was being done.

It appeared that not long after the plaintiffs had commenced their work on the contract they were informed, as they said, by the engineer, but which he denied, that he was "interested" in the contract, in what way they did not know, but they assumed in the profits. They did not, however, object to his acting, and they received some seven progress estimates certified by him. It was proved that he was not in fact so interested, and he was not a member of the construction company, his relations to which I shall consider more fully hereafter. During the attempts at a settlement, and while the plaintiffs were endeavouring without success to obtain the final estimate, they were also complaining that Wingate, owing to his long connection with Young, was not in a position to deal fairly with them.

Statement. It may be noticed here that the plaintiffs sublet several portions of the works they had contracted to execute. There was no written consent on the part of the railway company's engineer to their doing so, but he was aware that it was done either at the time or shortly afterwards, and no objection was ever made by him. These contracts required that a final estimate should likewise be obtained by the sub-contractors from the railway company's engineer. These he refused to give at the instance of Young, acting on behalf of the Dominion Construction Company.

The action was tried at Hamilton in May, 1897, before ARMOUR, C. J., who, at the close of the case, gave the following judgment :—

ARMOUR, C. J. :—

I think the plaintiffs are not bound by that term of the contract which requires a certificate from Wingate, for two grounds. I think that Wingate was disqualified in the first place because he was from the beginning Young's man. He was brought here by Young; he was appointed by the railway company as part of the bargain Young made with the railway company—or rather that the firm of James N. Young & Co. made with the railway company. He has continued to be the nominee of J. N. Young & Co., and he continued to be the nominee of the Dominion Construction Company as the engineer of the railway. He was nominally the engineer of the railway company, but really and substantially the engineer of the Dominion Construction Company. They paid him and he himself felt that he occupied that position, for according to his own account, he, at the instance of the Dominion Construction Company, reduced his own salary. It is not a likely thing that he would have reduced his own salary if the railway company were answerable for it, but he shewed that he recognized those persons in whose employ-

ment he was, the Dominion Construction Company, as the persons to whom he was indebted for his employment and he reduced his salary accordingly.

Judgment.

ARMOUR,
C.J.

Then, I think, the plaintiffs, as soon as they discovered the arrangement between him and the Dominion Construction Company, had the right to say: "He is not our choice as a judge under this contract and we repudiate our being bound by the term of the contract which requires a certificate from him."

Then on another ground I think they are not bound by that requirement of the contract. I find that Wingate and Young both were aware of sub-contracts being entered into with Good & Co., upon the same terms as Good & Co.'s contract with the Dominion Construction Company, requiring a certificate from this engineer of the work being done, the final estimate. I find that Wingate refused to give final certificates, acting under instructions from Young, who was acting for the Dominion Construction Company and who directed Wingate not to give those certificates under those sub-contracts. Now I think that that was a fraud upon Good & Co. The result to Good & Co. would be very serious if they were bound by Wingate's certificate as between them and the construction company, and yet there was nothing binding as to the engineer's certificate between them and their sub-contractors. I think that it was a mistake on Young's part to act in that way, and it is quite plain that Wingate throughout deemed himself to be the engineer of the construction company, because he writes this letter, disclaiming having anything to do with these sub-contracts: "In reply to your favour of the 9th inst., I beg to say I have complied with the conditions of the only contract with which I have anything to do, and this contract is with Messrs. Good & Co., to whom Messrs. Barrie & Ross should apply for any information desired." Now if he was the engineer of the railway company he had to do with all the contracts. He had quite as much to do with the sub-contracts, being the engineer of the company,

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ARMOUR,
C.J.

as he had to do with the contract of the Dominion Construction Company and Good & Co. So it is plain upon Wingate's own intimation that he was not considering himself at all as the engineer of the railway company, but that he was acting, as he was employed to act, for the Dominion Construction Company as their engineer. As an independent engineer he ought to have dealt with all the contracts referred to him and ought not to have allowed the interference of the Dominion Construction Company to prevent him dealing with these sub-contracts.

I think, therefore, that they are not bound by this paragraph of the contract, and that there must be a reference to a referee under section 106 of the Judicature Act; and I think the defendants, except the railway company, must pay the costs of the litigation up to the present time; subsequent costs and further directions will be reserved; and I direct that judgment be entered dismissing the action against the railway company without costs. If the parties cannot agree upon a referee, I will name the referee under section 106. Proceedings will, of course, be stayed for thirty days.

The Dominion Construction Company and Wingate appealed, and the appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and LISTER, JJ. A., on the 15th of November, 1898.

Osler, Q. C., and D'Arcy Tate, for the appellants. It was not found by the learned Chief Justice that Wingate had been corrupted by the construction company paying him the salary to which he was entitled, nor that he had in fact in any way been influenced thereby, nor that he had been in any way influenced by the arrangement made between the railway company and the construction company for the payment by the latter of his salary. The cases as to the disqualification of an engineer or architect

are uniform in this that unless the engineer or architect has a pecuniary interest in the matter in which he has to determine between the employer and the employed he is not by reason of any other interest such as relationship, friendship or other like interest to one of the parties, disqualified from acting in the manner in which the parties have agreed he should act: *Jackson v. Barry R. W. Co.*, [1893] 1 Ch. 238; *Farquhar v. City of Hamilton* (1893), 20 A. R. 86. Moreover, if the plaintiffs did not know of the contractual relationship between the railway company and the construction company at the time they entered into the contract, which is certainly open to question, they admittedly became aware of it very shortly afterwards, and continued, notwithstanding, to recognize Wingate as being duly authorized to act as engineer and to certify and determine as to the work they were doing under their contract with the construction company, and they cannot now, after the alleged completion of their contract, object to Wingate acting as such engineer. But even assuming that Wingate was disqualified from acting as engineer, the plaintiffs cannot recover for they have not complied with the condition precedent that they should obtain and produce to the construction company releases and discharges from their sub-contractors and others who were employed on the work, and from the persons from whom they purchased material.

Aylesworth, Q. C., and *S. F. Washington*, for the respondents. The findings of the learned Chief Justice are supported by the evidence and on those findings the appeal must fail. The concealed interest of the engineer is fatal: *Hudson's Law of Building Contracts*, 2nd ed., pp. 310, 311; *Kimberley v. Dick* (1871), L. R. 13 Eq. 1; *Pawley v. Turnbull* (1861), 3 Giff. 70. It was too late for the respondents to withdraw when they discovered Wingate's true position.

Osler, in reply.

Judgment. March 14th, 1899. BURTON, C.J.O.:—

BURTON,
C.J.O.

I am of opinion that the judgment of the learned Chief Justice at the trial should be affirmed.

It is, as we know, almost the universal practice that in railway contracts of this character it is usual to provide that all disputes and questions arising as to the construction of the contract or as to any thing done under it shall be submitted to the chief engineer of the company, although he must almost of necessity have a bias in favour of the company, but the contractor has in that case the opportunity of judging from the reputation and character of the engineer whether it would be safe for him to place himself so much within his power. He acts, at all events, with his eyes open, and very frequently, in order that his tenders may be accepted, is willing to run some risk; and if the stipulation had been that the chief engineer of the construction company should be the arbiter I do not doubt that it would have been perfectly valid.

But here the plaintiffs, so far as we can judge by the evidence, had no knowledge that though nominally the chief engineer of the railway company, Wingate was, in point of fact, the chief engineer of the construction company, and had been chief engineer of the previous construction company of which Young & Co. were the promoters and principal shareholders.

It is quite conceivable that if the plaintiffs had known of the actual position of affairs they would have declined to submit themselves to such a stipulation, and upon this short ground I think the judgment of the learned Chief Justice is right and should be sustained. Upon the reference Wingate may be called as a witness and may convince the referee that his measurements were correct.

For these reasons I do not think it necessary to add any thing to the very full and able judgments of my learned brothers.

But I think that in accordance with recent decisions it is wrong to make parties who are properly witnesses and

who are not chargeable with any part of the relief prayed parties to suits with a view to charging them with costs alone, and I think that the decree should be varied by dismissing the action as against Wingate also with costs: see *Burstall v. Beyfus* (1884), 26 Ch. D. 35; *Barnes v. Addy* (1874), L. R. 9 Ch., at p. 255.

With the variation referred to, I think the appeal should be dismissed.

OSLER, J. A.:—

The sole question is whether under the circumstances the plaintiffs were absolved from the obligation imposed upon them by the terms of their contract with the defendants of procuring the final estimate from Wingate, the engineer named in the contract, of the amount payable to them in respect of the works they had contracted to execute and which had in fact been completed agreeably to the specifications of the contract, and to the satisfaction and acceptance of the said engineer as required by the contract. Incidentally the defendants contend that another condition precedent has not been performed, viz., the execution of a release of all claims arising out of the contract on the part both of the plaintiffs and of mechanics, material men, and others. It will appear, however, that this does not stand in the plaintiffs' way if they were not obliged to procure the engineer's final estimate. If they were the action must fail, because they have never obtained it.

The learned Chief Justice held that Wingate was disqualified because, though nominally the engineer of the railway company, he was really the engineer of the construction company, and therefore not the independent officer to whom the plaintiffs believed they were submitting themselves; that they had the right, on discovering this, to say that he was not their choice as a judge under the contract and to repudiate those terms of the contract which bound them to submit themselves to his decision.

Judgment.

BURTON,
C.J.O.

Judgment.

OSLER,
J.A.

We have not to determine the question whether the plaintiffs would have been entitled to relief if their contract had been one which bound them to accept the judgment and decision on the several points in dispute of a person stated in the contract to be the engineer of the company with whom they were contracting. Very different considerations would then have arisen and the evidence would perhaps fall short of making out a case for relieving the plaintiffs from their obligation to be bound by the decision of the construction company's own officer, on whose professional honour, position and intelligence, they would in such a case be taken to have deliberately relied, notwithstanding the fact that his relation to his own employers might inevitably or insensibly prevent him from acting with what the late Lord Justice Bowen described as "the icy impartiality of a Rhadamanthus."

See *Jackson v. Barry R. W. Co.*, [1893] 1 Ch. 238; *Eckersley v. Mersey Dock and Harbour Board*, [1894] 2 Q. B. 667; *Ives v. Barker*, [1894] 2 Ch. 478; where the position of such an engineer and the circumstances under which the Court will declare him not qualified to act are very much considered by the Court of Appeal. See also *Farquhar v. City of Hamilton* (1893), 20 A. R. 86.

The case before us is of a different character. The person to whose judgment the plaintiffs agreed to submit themselves was one whose very description as chief engineer of the railway company implies that as between the contractors and sub-contractors, *i.e.*, the construction company and the plaintiffs, he occupied a neutral or indifferent position, and that he was not an engineer or officer of the former or a person who was practically subject to their control. The question is not as to Wingate's honesty or *bona fides*, upon which I make no reflection, but whether he was such a person as the plaintiffs had bargained for. If he was not I cannot think that they are bound by those conditions of the contract which relate to or are dependent upon his action. The chief engineer of the railway company having been chosen, they might well assume

that he was free from many of the ordinary influences to which, as an engineer or official of the company with whom they were contracting, he might have been subject, and to which they would have submitted themselves with their eyes open had a person occupying that situation been selected. They would have the right to assume that he was not the servant or agent of the construction company, not their salaried official, that he owed no duty to them as having been employed for reward, that he was independent of them in the sense that they could not discharge him or affect his position with the railway company, if they were dissatisfied with his conduct, and that there was no influence which would necessarily or probably operate upon him, particularly having regard to the terms of the construction company's contract with the railway company, to take a severe view of the work as to extras or otherwise, or in other words that they were more likely to have from the railway company's official an independent, unbiassed judgment.

Nominally, Wingate was the chief engineer of the railway company, though the fact of his formal appointment is not very clearly proved. His real position, which was quite unknown to the plaintiffs, was very different. I have already adverted to the relations between the two defendant companies. It is not too much to say that the railway company was the construction company under a different name. Its franchise was controlled, and it was organized and its board of directors manned by that company simply for the purpose of enabling the latter to build the road, and its property and assets of every kind, out of which alone the salaries of its nominal officials could be paid, were owned or controlled by the construction company. Then let us consider Wingate's own relations to that company and to Young, who was its promoter and one of its chief officers, as he had been of its predecessor. With Young he had been associated in the years 1885 and 1886 in connection with a road built in the State of Kansas, and afterwards, through Young's influence, for about nine months in another road near Chicago. He

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was brought to this country by Young in the year 1889 for the purpose of being appointed engineer of the railway company in connection with the first construction contract of J. N. Young & Co. It was part of the arrangement between Young and the railway company that he should be appointed as their engineer. As Young himself says, "It was I who had the company appoint him." Under both of the construction companies' contracts his salary was to be paid, not by the railway company, but by the construction company. I think Wingate knew that, and the only hand by which he was ever paid anything, or which, indeed, ever had the means to pay him, was that of the construction company.

When the first company failed, arrears of salary were due to him of about \$3,000. To that company (J. N. Young & Co.) he rendered his account therefor, and when the new company came in, although, as he says, he "naturally held the railway company" (it may be added, for whatever they were worth), it was by the former, in consequence of "some intimation" from their president, Mr. Beckley, that he expected these arrears to be paid or to whom he looked for payment.

Another intimation or suggestion from Mr. Beckley, shortly after the company was formed, that it was necessary to economize all round, induced him to lower his salary by a considerable sum for nearly a year, and it was to Mr. Beckley and Mr. Young he applied when he thought the time had arrived to restore it to its old figure. In short, he has throughout regarded Young or the construction companies as his real employers, as well as paymasters. His conduct in refusing to give final estimates or certificates to Good & Co.'s sub-contractors, not because he had not consented to those sub-contracts, but because Young instructed him not to give them, strongly shews how completely he considered himself the engineer of the construction company, and subject to their control and direction. He knew, as also did Young, as the learned trial Judge finds, that these contracts had been entered

into on the same terms as Good's own contract with the construction company; and if he was in truth the independent engineer of the railway company, he occupied towards Good's sub-contractors, in relation to their contracts and his duty or authority to certify, a position precisely similar to that which he occupied towards Good & Co. themselves as sub-contractors of the construction company, and it rested with him alone to approve of or consent to the former and to determine whether the certificates or estimates should be given.

On these grounds I agree with the judgment of the learned Chief Justice at the trial, that Wingate was not such a person as the plaintiffs had chosen under their contract to decide the questions arising between themselves and the construction company, but was really the engineer of and in the pay of that company, or was, as the learned Judge compendiously expresses it, "from the beginning Young's man," whose final estimate and decision with regard to these matters in dispute the plaintiffs were not bound to procure as a condition precedent to payment.

I think also that the obligation to furnish releases to the company of claims "arising in any manner out of the agreement" is dependent upon the obligation to procure a final estimate, as it is only the sum mentioned in the final estimate which is payable upon the releases being procured. If one condition fails, so also, in my opinion, does the other. The same observation applies to the releases from material men, mechanics, etc., but there is evidence from which it may properly be inferred that there were no outstanding claims of that kind.

I would therefore dismiss the appeal with costs.

As regards the appeal of the defendant Wingate, I have no note that it was specially pressed on the argument, doubtless because it was not considered that he was in much danger of loss if the judgment stood as against his co-defendants, yet it is lodged and comes regularly before us to be disposed of. No cause of action is

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J.A

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proved as against him. He seems to have been made a party mainly, if not altogether, for the purpose of discovery, and was not a proper party for that purpose or for any purpose on the theory on which the action is held to be maintainable against the other defendants. As to him, therefore, the appeal must be allowed and the action dismissed: see *Mathias v. Yetts* (1882), 46 L. T. N. S. 497; *Ontario Industrial Loan Co. v. Lindsey* (1883), 3 O. R. 66; *Burstall v. Beyfus* (1884), 26 Ch. D. 35. On the whole it may be proper that this should be without costs.

MACLENNAN, J. A. :—

The question in this appeal is whether Wingate's relation to the construction company at the time of the contract, or afterwards, or any conduct of his, has so disqualified him from acting as arbitrator between the parties under the contract, that the plaintiffs are entitled to recover the balance due to them without reference to him.

The situation at the date of the contract was this: The railway company had been empowered in 1889 to construct and operate a line from Toronto to Hamilton, and to extend the same 'from Hamilton to Brantford and also to Welland. In that year a Mr. Young contracted with the company to construct the line, and he sent for Wingate, who had been associated with him in previous railway works in the United States, to come to Canada, and he got him appointed chief engineer of the railway company.

Young, and four other persons, were, in fact, a construction company, incorporated in Illinois, and it was with that company, by the name of Young & Co., and not with Young alone personally, that contracts were made by the railway company, one in 1889 and another in 1891, for the construction of the line. Under those contracts construction was begun and went on until 1894, and Wingate continued during all that time to be the engineer of the

railway company. It does not appear how far construction had proceeded during that time, but Young & Co. then found themselves unable to proceed further without more capital, and they found a new capitalist, a Mr. Beckley, and with him formed the Dominion Construction Company. The old contract was cancelled, and a new one was made between the railway company and the new construction company, dated the 4th of September, 1894, and it is for the construction of the whole line, from Toronto to Hamilton, and also from Hamilton to Welland, and from Hamilton to Brantford.

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 MACLENNAN,
 J.A.

The consideration to be received by the construction company was mortgage bonds and paid-up stock of the company, proportionate to the number of miles of track constructed; and also all Dominion, municipal and private bonuses, which might be obtained by the company. The railway company were to appoint a chief engineer, who was to have entire charge of the engineering department of the railway, and who, and his assistants, were to have full charge of the work, and whose decision upon all questions as to the meaning of the contract, so far as the work of construction was concerned, was to be final and binding on the parties. The railway company were also to appoint a solicitor, and the construction company were to pay the salaries and compensation of both the chief engineer and solicitor. The compensation to the construction company was to be paid on monthly estimates, on the certificate of the chief engineer. The construction company also had a right to have one of their directors present at all meetings of the railway company's board, with the power of proposing, suggesting and discussing any resolution or motion.

This contract is said to be similar to the former contracts between the railway company and Young & Co., and Wingate continued to be the company's engineer under this new contract, as before. Under this new contract the work proceeded until July, 1895, by which time the line between Hamilton and Brantford had been completed and

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was in operation, and the construction company determined to sublet the work between Hamilton and Welland. Tenders were advertised for, and on the 10th of July, 1895, the contract between the construction company and the plaintiffs was entered into. The following are its material provisions: The plaintiffs were to complete the work, supplying all materials, on or before the 15th of November, 1895, to the satisfaction and acceptance of the chief engineer of the railway company, according to rules and specifications annexed, and directions received from time to time from him or his assistants. There was a time limit for completion, and any loss arising from the contractor's delay was to be made good to the company, and to be settled by arbitrators mutually appointed. The work and materials were to be paid for according to a schedule of prices, at a rate of so much per unit of quantities, and on or about the first day of each month an estimate was to be made of the relative value of the work done, to be judged by the chief engineer, and ninety per cent. of the estimate was to be paid about the tenth of the following month. At the completion of the work to the satisfaction and acceptance of the chief engineer, there was to be a final estimate made of the character, quality and value of the work according to the agreement, when the balance was to be paid within thirty days thereafter, upon their giving a release to the construction company from all claims growing out of the agreement, and upon procuring and delivering to the company releases from mechanics, material men, and others, of all liens, claims and demands for materials provided, and work done under the contract; and the procuring and delivering of the releases were to be conditions precedent to the obtaining of payment. There are also covenants by the plaintiffs to pay their bills for labour and materials monthly, and to indemnify the company against claims for damages, for accidents, etc., but these last covenants do not seem to be material to the present appeal; and finally it was agreed that, except as excepted, the decisions of the chief engineer should be

final in any dispute between the parties concerning the agreement. The plaintiffs entered upon the work, and estimates were made monthly by the engineer, under which they received payment of the stipulated percentage, and the work was completed by the 31st of December, to which the time was extended, except some ballasting which the construction company took off the plaintiffs' hands; and it is admitted that the work was so done to the satisfaction and acceptance of the engineer. When the time came for a final estimate, differences arose, both as to quantities and classification, and as to extras, and as to certain work which was to be paid for by a percentage on actual cost, called a "force account." The parties endeavoured for several months to settle their differences independently of the engineer, but were unable to do so. At the same time, the plaintiffs were asking the engineer for a final estimate, which was never given, although he prepared a statement of quantities of everything but ballasting, but without applying to it the schedule of prices, and it is said this was prepared to enable the plaintiffs to settle with their sub-contractors.

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MACLENNAN,
J.A.

I think the effect of the evidence is, that the plaintiffs furnished the company with particulars of all their claims, sufficient to have enabled the engineer to make a final estimate such as the contract called for, but it is said they were not furnished directly to the engineer. But the latter was frequently called in, during the discussion between the parties, when endeavouring to come to a settlement, and it is difficult to understand why he did not prepare a final estimate. It is also unfortunate, for the parties appear at one time to have come very near to an actual settlement. The end of it was that the present action was brought on the 10th of May.

It is admitted that the contracts between the railway company and the Young company were similar to that with the construction company; and the latter contains a statement that the former contracts had been assigned to the new company a few days before, except so far

Judgment. as the line had been completed, and except as to the
MACLENNAN, rights and benefits which the Young company and
J.A. their assignees, the new company, had become entitled
to. It is to be assumed, therefore, that in respect
of the completed portion of the line the Young com-
pany had, before making the contract with the plaintiffs,
received a large block of paid-up stock of the com-
pany as payment for work done, and that when the
question of the final estimate, to which the plaintiffs were
entitled, arose, Young & Co. and the construction company
between them, had become possessed of the whole of the
paid-up stock which had been issued, and had virtually
become the railway company to all intents and purposes.
The effect of that was that Wingate, though nominally
still the engineer of the railway company, had become and
was actually and substantially the engineer of the con-
struction company. Having regard to the contracts, and
the kind of payment which they were to receive, Young &
Co. and the construction company were from the beginning
constructing the railway for themselves. It was becoming
their property every day as the work proceeded, and when
finished on the 31st of December, 1896, it had become theirs
absolutely; they were then the railway company.

Besides all this, there had been intimate relations be-
tween Young and Wingate in former contracts. Young
had procured his appointment. He was his nominee;
Young & Co. and the construction company were paying
his salary; he looked to them for it. There was a large
balance, perhaps \$3,000, still due to him for salary prior
to the contract with the plaintiffs. From the 1st of Septem-
ber, 1894, to 30th of June, 1895, he had voluntarily reduced
his salary from \$3,000 per annum to \$2,400, because the
construction company had urged him to economize in the
cost of construction. I cannot think these circumstances
unimportant as indicating a direct influence of the con-
struction company over him, from which he would have
been free as the engineer of the railway company alone.
Now, there is no evidence that either when the plaintiffs

entered into the contract, or at the time of its completion, or, indeed, until after the commencement of this action, they knew of the relations between Young & Co. or the construction company and the railway company, or that they were being, and had been, paid in paid-up shares, or that the chief engineer was a referee between them, or of the other circumstances to which I have referred. They had a right to assume that whatever bias Wingate might have in favour of the railway company, he had none as between the plaintiffs and the construction company; and I think there were such relations between the construction company and Wingate, both at the making of the contract, and when the time for making the final estimate arrived, as require us to hold that he was disqualified from making the final estimate of what was payable to the plaintiffs under the contract, those relations being unknown to the plaintiffs when they entered into the contract, and when they were calling upon him to make his estimate.

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MACLENNAN,
J.A.

In *Eckersley v. Mersey Dock and Harbour Board*, [1894] 2 Q. B. 667, Lord Esher, M.R., in the Court of Appeal, says it is not sufficient that the relation of the engineer to the company is such that he might be biassed, but that it must be shewn that there is a probability of bias. I cannot say that it is shewn here that Wingate was so biassed as that he would not have given a fair certificate. Very likely he would have acted as an honourable professional man. But I think it exceedingly probable that he would have been biassed, it may be unconsciously, by the circumstances in which he was placed. His duties as engineer under the earlier contracts required him to be acquainted with their contents, and to know that Young & Co. were acquiring the paid-up capital of the company upon his certificates, from time to time; and he must have had the same knowledge of the construction company's contract, and that they were, in fact, building the road for themselves. He must have known also that the identity of the railway company and the construction company had become complete in form, as well as in substance, when Mr. Beckley had become

Judgment. president of the railway company immediately on completion, in January, 1896.
MACLENNAN, J.A.

I am, therefore, of opinion that the want of a final certificate from Wingate is no bar to the plaintiffs' action.

But it was also objected that the plaintiffs cannot recover without production of the releases, the delivery of which is by the contract made a condition precedent to the right of payment. I think this objection also fails.

There are two kinds of releases. There is a release of the plaintiffs' claims against the defendants, and there are also releases of liens, claims and demands from mechanics, material men, and others, for materials provided and work done about the work. Both kinds of releases are to be to the defendants, and must, therefore, be of claims against them or liens upon their property. It does not appear that there are in fact any claims of mechanics, material men, or others, against the defendants, or any liens of any such persons upon the defendants' property or upon the railway, and therefore there can be no question upon the second kind of releases referred to. With regard to the release to be given by the plaintiffs to the defendants, it is evident that the payment and release must be simultaneous acts, and that the plaintiffs cannot be required to deliver a release until the amount due is ascertained and payment ready to be made. The object of the present action is to ascertain what is due, as well as to obtain payment, there being a disagreement between the parties how much is still due.

I am, therefore, of opinion that the judgment of the learned Chief Justice is right and should be affirmed.

LISTER, J.A. :—

I am of the same opinion.

Appeal dismissed.

R. S. C.

GORDON MACKAY & COMPANY V. THE UNION BANK OF CANADA.

Bankruptcy and Insolvency—Assignments and Preferences—Payment of Money—Cheque.

A trader in insolvent circumstances sold his stock-in-trade in good faith and directed the purchaser to pay as part of the purchase money a debt due by the trader to his bankers, who held, as collateral security, a chattel mortgage on the stock-in-trade. The purchaser had an account with the same bankers, and gave to them a cheque on this account for the amount of their claim, there being funds at his credit to meet the cheque :—

Held, that this was a payment of money to a creditor and not a realization of a security, and that the bankers were not liable, in a creditor's action, to account for the amount received.

Davidson v. Fraser (1896), 23 A. R. 439, 28 S. C. R. 272, distinguished, on the ground that the cheque never was the property of, or under the control of, the insolvent.

Judgment of ARMOUR, C. J., affirmed.

THIS was an appeal by the plaintiffs from the judgment of ARMOUR, C.J. Statement.

The action was brought on the 1st of September, 1896, by the plaintiffs on behalf of themselves and all other creditors of one Joseph Robinson, a shop keeper at Wiarton, for a declaration that a chattel mortgage made by him on his stock-in-trade in favour of the defendants on the 12th of November, 1895, was invalid under the Bills of Sale Act, and also as a fraudulent preference, and to compel the defendants to account for the sum of \$2,100, received by them on the 28th of November, 1895, in realization, as the plaintiffs alleged, of this mortgage.

The action was tried at Toronto on the 10th of September, 1897. It was proved that Robinson's stock-in-trade had been sold on the 28th of November, 1895, to a firm of Symon & Son, and that Symon & Son, who had an account at the Wiarton branch of the defendant bank, gave to the bank agent there, pursuant to instructions from Robinson, a cheque on the bank, in favour of the bank, for \$2,100, and then received from the agent a dis-

Statement. charge of the chattel mortgage. The legal effect of this transaction was the only question of general interest in the case.

At the close of the case judgment was delivered as follows:—

ARMOUR, C. J.:—

I find that Robinson at the time of the giving by him of the chattel mortgage of November 12th, 1895, to the defendants, was in insolvent circumstances and unable to pay his debts in full, and I find that his circumstances were known to the defendants by reason of the knowledge thereof of the defendants' manager at Wiarton, where Robinson carried on his business. I find the chattel mortgage was invalid by reason of noncompliance with the provisions of the Bills of Sale and Chattel Mortgage Act. I find that the sale of the mortgaged goods made on the 28th of November, 1893, to Symon & Son, was a *bonâ fide* sale, and that the sale was not made by the defendants under the chattel mortgage, but was made by Robinson himself. I find that at the time of such sale the defendants were creditors of Robinson in respect of a promissory note for \$1,700, as collateral security for which the chattel mortgage was made, and in respect of a further promissory note for \$400.

I find that in part payment of the purchase money of the mortgaged goods Symon & Son, with the privity and consent of Robinson, and on his behalf, gave their cheque on the defendant bank to the defendants on the day of the sale for the sum of \$2,100, and received from the defendants a discharge of the chattel mortgage, and I find that this constituted a payment of money by Robinson to the defendants, his creditors, and they are protected by the provisions of R. S. O. (1887) ch. 124, sec. 3.

I do not think that this case is governed by *Davidson v. Fraser* (1896), 23 A. R. 439. If I thought so I should follow it, with, however, a wry judicial face.

The logical result of that case is, that if Symon & Son had paid to the defendants the \$2,100 in notes of any other chartered bank, or even their own notes payable elsewhere than at Wiarton, this would not have been a payment of money.

Judgment.
ARMOUR,
C.J.

It may be that an appellate tribunal will hold that the payment in this case was not a payment of money, but at present I cannot.

I do not think that the taking by the defendants, as security collateral to their debt, of the chattel mortgage, which I find to have been invalid, prevented them from being creditors so as to take the benefit of the payment of the \$2,100, and I do not think that any pressure the defendants exercised upon Robinson to get him to make the sale of the mortgaged goods had the effect of making the sale theirs and not his.

I therefore dismiss the action with costs.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, and MOSS, JJ.A., on the 15th and 16th of March, 1899.

Watson, Q.C., and A. C. MacMaster, for the appellants.
D. W. Saunders, for the respondents.

Judgment was given at the conclusion of the argument.

BURTON, C. J. O. :—

I do not think that we need reserve judgment in this case. Mr. Watson's elaborate argument has failed to convince me that the judgment is not correct. I had some doubt whether the finding of the Chief Justice that the debtor was insolvent at the time he gave the mortgage to the bank was supported by the evidence, but considering the evidence that Mr. Watson has referred to in his reply, I think that finding cannot be controverted; and as I agree with the finding of fact as to the insolvency of the debtor, so I agree with the findings (1) that the sale of the goods

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BURTON,
C.J.O.

in question was made not by the bank but by Robinson, the debtor himself, and (2) that there was at the time of the sale of the goods a *bonâ fide* debt by Robinson to the bank of \$2,100.

These being the facts, I think the only question that it is necessary for us to consider in order to dispose of the case, is the question whether the handing by Symon & Son, the purchasers of the goods, to the bank of their own cheque in favour of the bank, and drawn upon the purchasers' funds in the hands of the bank, was a "payment of money to a creditor" within section 3 of the Assignments and Preferences Act, R. S. O. (1887) ch. 124.

The facts distinguish this case from *Davidson v. Fraser* (1896), 23 A. R. 439, 28 S. C. R. 272.

There the transaction was the transfer by the debtor of a cheque of a third person, which had come into the debtor's custody and control, and that transfer we held not to be a payment of money within the Act. Here the cheque of Symon & Son, the purchasers of the goods, was handed directly to the bank in payment of its claim. It was certainly never intended that the decision in *Davidson v. Fraser* should be considered to mean that what took place in this case was not a "payment of money" within the statute.

Coming to the conclusion, therefore, that what we have here is a "payment of money," it is protected by the Act, and the appeal must be dismissed.

OSLER, J. A. :—

The evidence establishes that there was a debt of \$2,100 due to the bank, and also that the sale of the goods in question was made by Robinson and not by the bank. It may be, and it probably was, the case that Robinson was advised by the bank to sell, but that falls far short of making the sale the act of the bank, and not the act of Robinson. That being so, and the cheque in payment of the bank's claim being Symon & Son's own cheque handed

by them to the bank direct, it is clearly a "payment of money" within the meaning of the Act.

In *Davidson v. Fraser*, I differed from the rest of the Court, being of opinion that what took place there was a "payment of money" within the Act. From the reasons I gave for coming to that conclusion it will be evident that it would not require another case to differ very greatly from the facts in that case to induce me to distinguish it, and the facts in this case are very different. Here there was no transfer of the cheque of a third person, but the handing over by Symon & Son, the drawers, to the bank, the drawees, of a cheque, in favour of the bank, in discharge of a debt due to the bank either at the request of the debtor, the vendor of the goods, or to relieve the property bought by them from the charge he had created thereon, it matters not which. This is certainly a "payment of money to a creditor" within the statute.

The money having been paid upon a valid debt, it cannot be followed unless the case comes within sec. 8 of the Assignments Act, R. S. O. (1887) ch. 124, as amended by 58 Vict. ch. 53 (O.), and the case is not within that section, because the goods sold to Symon & Son, in respect of which sale the payment was made to the bank, were not sold by the bank but by Robinson. That section of the Act not being applicable, therefore, the money cannot be followed.

The cases of *Martin v. McAlpine* (1883), 8 A. R. 675, and *Merchants Express Company v. Morton* (1868), 15 Gr. 274, cited by Mr. Watson, are not in point. The first is the familiar case of a sheriff, having two executions in his hands, proceeding to seize and sell under both; and, the first execution having been afterwards set aside, the sale enured to the benefit of the second execution creditor. The other case was one of following stolen money, and the principle on which it was decided has no application here.

I think that the judgment was right and that the appeal must be dismissed.

Judgment.

OSLER,
J. A.

Judgment. MACLENNAN, J. A. :—

MACLENNAN,
J.A.

I agree. This case is not unlike *Gibbons v. Wilson* (1890), 17 A. R. 1. I said there : "The statute expressly exempts from illegality, as acts of unlawful preference, payments in money made to a creditor, and the borrower in the present case might have received the money from the lender, and might at once have paid it to Stuart & Co., in satisfaction of their debt. * * I think it would be legislation, and not construction, to hold that the statute has forbidden a debtor to employ an agent to do for him what he may lawfully do himself."

I adhere to the opinion I expressed in that case. There is no question that there was here a *bonâ fide* debt due to the bank, and the sole question is whether the bank has been paid in a way forbidden by the statute. It makes no difference whether it was the debtor's money or the purchasers' money which the bank received in discharge of their claim. The handing over by Symon & Son of their cheque to the bank was a "payment of money" within the meaning of the statute, and is therefore protected.

Davidson v. Fraser was a very different case. I said in that case that a payment by the debtor's own cheque would be a good payment of money, and it cannot be that the payment to the creditor by a third person handing the creditor his own cheque is any the less a "payment of money." In *Davidson v. Fraser* the debtor transferred the cheque of a third person, which in his hands was only a security for money, and the handing of which by him to his creditor was not a "payment of money" within the Act.

Then, the money cannot be followed in the bank's hands. The facts take the case out of section 8 of the Assignments Act, as it was at the time of the transaction, and apart from that section there would be no right to follow the money. This has been decided over and over again under the statute of Elizabeth. The Court simply removed the fraudulent conveyance out of the creditor's

way, leaving him to recover upon his execution in any way open to him ; but the law did not make the grantee, before his security was attacked, a trustee, and accountable to the attacking creditor.

Judgment.
MACLENNAN,
J.A.

On both these grounds I think the appeal must be dismissed.

Moss, J. A. :—

I also agree that the appeal must be dismissed.

The sale of the goods here was clearly made by the debtor who had a perfect right to make the sale. The evidence shews that it was a fair sale, made and carried out in good faith between the debtor and the purchasers. It was not a sale by the bank in enforcement or by way of realization of a security. The case is, therefore, not within section 8 of the Assignments Act, and the money paid to the bank in discharge of its claim cannot be followed.

Further, I think there was a good “payment of money” within section 3 of the Assignments Act, and that the transaction is protected by the words of that section.

The case is not within *Davidson v. Fraser*. That was the case of a debtor handing over a cheque of a third person which was held to be a transfer of a security for money ; but here Symon & Son having funds in the bank give to the bank their cheque against those funds. This is clearly a payment of money.

I think that the judgment was right and should be affirmed.

Appeal dismissed.

R. S. C.

YOUNG V. TUCKER.

Water and Watercourses—Drainage—Cultivation of Land.

While the owner of land has an undoubted right to drain it in the ordinary course of husbandry, he must take care that any water collected by his drains is carried to a sufficient outlet, and if the water is drained into a pond which is not large enough to hold the additional volume of water thus brought into it, he is liable in damages to a person whose land is flooded by water overflowing from such pond. Judgment of the Drainage Referee reversed.

Statement. THIS was an appeal by the plaintiffs from the judgment of the Drainage Referee.

The plaintiffs and the defendant were farmers residing in the township of Moore, and the plaintiffs' complaint was that the defendant in draining his farm brought water upon theirs. The facts sufficiently appear in the judgments.

The action was referred to Mr. Hodgins, Q.C., the Drainage Referee, and was tried before him on the 26th and 27th of April, 1898, the following judgment being given by him at the close of the plaintiffs' case:—

THE DRAINAGE REFEREE:—

During the progress of this case I have been considering the question of law governing the claim of the plaintiffs, and have satisfied myself that, on the evidence of their witnesses, they have not established a right of action against the defendant. The evidence shews that the waters complained of are not brought by continuous artificial means from the lands of the defendant to the plaintiffs' farm but that waters from the defendant's and other farms, are, through artificial cuttings, drained into natural swamps or ponds on several of the intervening farms, and then flow through an open drain and across municipal road drains to a drain on the plaintiffs' farm. From the northern portion of the defendant's farm to a

swamp, which extends over portions of his neighbour Campbell's and his (the defendant's) own land, there is an artificial drain which is cut through a ridge on his land. The water in it is stated to be sluggish in its flow, and the cutting which the defendant has made on his own land drains the surface water from the upper portion of his land into this swamp, which is a natural reservoir or pond, and into which the defendant has, I think, a right to drain his farm. This swamp or natural reservoir extends, as I have said, over portions of the defendant's and Campbell's lands. Then from this first swamp there is an artificial cutting on a portion of Campbell's land which is cut through two ridges. The flow of water through Campbell's cutting is swift, and is indicated on the filed plan as a "swift current." This Campbell cutting drains his land and this first or upper swamp, and is continued to a second and lower swamp, which, according to the evidence of John W. Young, one of the plaintiffs, is deeper than any of the other swamps. Then the water from the Tucker-Campbell swamp, and the drainage water of Campbell's land are carried south to this deeper swamp, which extends over both Campbell's and Mason's lands, and also forms a natural reservoir for the drainage of their lands. Then I also find that Mason, in order to drain this natural and deeper reservoir, and the water which used to form a lake over his farm, has constructed an artificial drain through his land down to a large open ditch designated on the plan as the "open drain," which takes the trend of the water out of its natural course, as some of the witnesses say, and causes it to flow into or across the municipal drains on the side road between lots 9 and 10, the waters of which here unite with these upper waters and are carried across the side road or municipal drains into the drain on the plaintiffs' lands. I cannot therefore on this evidence find that there is a continuous artificial drain carrying waters from the defendant's farm to the plaintiffs' lands.

Judgment.

DRAINAGE
REFEREE.

In Angell on Watercourses, 7th ed., p. 120, after speaking

Judgment.

DRAINAGE
REFEREE.

of the flow of surface water and the lawful right of an owner to enjoy his real property as he sees fit, the author goes on to say: "The obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil. * * A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whencesoever it may come, to pass off in a different direction, and in larger quantities, than previously. If such an act causes damages to adjacent land, it is *damnum absque injuriâ*." Then at p. 125 he says: "The owner of lower ground has no right to erect embankments whereby the natural flow of the water from the upper ground shall be stopped," (I only quote this as introductory to the following); "but he may, and good husbandry sometimes requires that he should, cover up and conceal the drains through his own land, or he may open drains on his own land, keeping the place of discharge unchanged. And as he may use running streams to irrigate his land, even though he does thereby, not unreasonably, diminish the supply of his neighbour, so also he may use proper means of draining his ground where it is too moist and discharge the water according to the natural channel, even though the flow of water upon his neighbour be thereby somewhat increased." Now I find upon the evidence that the swamp at the junction of Tucker and Campbell's lands is a natural reservoir or pond for the drainage of the surface water of his farm, and that the swamp at the junction of Campbell and Mason's lands is another natural reservoir or pond for the surface and other water flowing into it, and that the water from these natural reservoirs is conveyed by an artificial drain through Mason's farm, and the "open drain," to the side road or municipal drains, and across the township road to a drain on the plaintiffs' land, and that there is no continuous artificial drain which conveys the surface waters from the defendant's farm to the plaintiffs' farm. I must

therefore hold that the defendant had the legal right, in good husbandry, to drain the water on the upper portion of his land into the natural reservoir or swamp on his farm—the same right as he would have if it were a running stream; and that, having such legal right, he cannot be made liable for the alleged damages to the plaintiffs' land. I, therefore, dismiss the plaintiffs' action with costs.

Judgment.

DRAINAGE
REFEREE.

The plaintiffs' appeal from this judgment was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 18th and 19th of January, 1899.

Aylesworth, Q.C., and *F. W. Kittermaster*, for the appellants. The learned Referee having found that by reason of drains constructed by the defendant, surface water which would not otherwise have come to plaintiffs' land at all, was brought to and discharged upon the plaintiffs' land, should have held that the plaintiffs were entitled to the relief asked for: *Ostrom v. Sills* (1897), 24 A. R. 526. The plaintiffs' drain was a private drain, and the defendant contributed nothing to its construction or maintenance, and had no right to make use of it for draining his land: *Williams v. Richards* (1893), 23 O. R. 651. If the defendant desired to drain his land through the plaintiffs' farm he should have taken proceedings under the Drainage Act. It is clearly established that the defendant's drains have the effect of bringing water with increased velocity and in greater volume to the plaintiffs' land, and that thereby the plaintiffs have suffered damage. For this damage the defendant is liable: *Malott v. Mersea* (1885), 9 O. R. 611; *Derinzy v. Ottawa* (1887), 15 A. R. 712.

A. Weir, for the respondent. The appellants' damage, if any, arose from their own acts in constructing a large ditch, which, by subsequent extensions made without the privity of the respondent, tapped and diverted several large swales, and in making and allowing others than the

Argument. respondent to make extensive drainage works which brought water into the ditch the overflow of which is alleged to have caused damage to the appellants. It is proved that the water from the respondent's lands and drains could not reach the locality where the damage is alleged to have been done, except through ditches and drains constructed by intervening owners, and the respondent is not liable. Moreover, what was done by the respondent was done in the course of good husbandry, and any water leaving his lands passed away in its natural course, and no action lies : *McCormick v. Horan* (1880), 81 N. Y. 86 ; *Meixell v. Morgan* (1892), 149 Pa. St. 415 ; *Peck v. Goodberlett* (1888), 109 N. Y. 180 ; *Broadbent v. Ramsbotham* (1856), 11 Ex. 602.

Aylesworth, in reply.

March 14th, 1899. BURTON, C.J.O. :—

If the injury complained of had been caused by the cultivation of the defendant's own land in the ordinary course of husbandry, I should agree with the learned Referee that it would be *damnum absque injuriâ*, for which no action could be maintained, but here the evidence establishes that the defendant made an artificial drain which brought water down from his own land into a swale, or, as the learned Referee describes it, a natural reservoir, which would not otherwise have gone there at all, causing the water in that reservoir to overflow into the drains of Mason, and thence over the plaintiffs' land. I am unable to agree that no action lies because the artificial water-course is not continued into the plaintiffs' land. I think the defendant is equally liable if by reason of his act the water in the reservoir is made to overflow upon the plaintiffs' land, causing him damage. I think, therefore, that the appeal should be allowed, but I think justice will be done by granting the injunction and nominal damages with costs and the costs of this appeal.

LISTER, J. A. :—

Judgment.

LISTER,
J.A.

It was proved that the plaintiffs were owners and occupants of the east half of lot 10, in the first concession of the township of Moore, and that the defendant was owner and occupant of lot 8 in the second concession of the same township, his lot being to the north and east of the plaintiffs'; that the plaintiffs, in or about the year 1880, constructed on their farm an open drain extending east and west, and finding its outlet to the west; that Mason, who owns the lot to the east of the plaintiffs', constructed an open drain on his lot extending east and west, and connected the same with the plaintiffs' open drain, using the same for his outlet; that he also constructed an open drain for a distance of thirty rods north from and connected with the open drain, and connected the north end of the ditch with a tile drain, which he extended up to, or nearly up to, the north end of his lot.

It was also proved that on the defendant's lot is a well defined depression commencing on the north-east portion thereof, and extending south-westerly to the dividing line between his lot and that of Campbell's, and thence in the same course on Campbell's land to the south-westerly part thereof, where there is a large marsh or swale extending over on Mason's land to the south.

This depression, except where separated by ridges crossing it, is continuous, and is indicated by the red line on the plan filed. A witness described it as "a chain of swales with ridges intervening." On the defendant's land to the east of this depression, or chain of swales, is another well defined depression or continuous swale, extending in a southerly direction through the first concession of Moore to the east of the plaintiffs' land, and this depression is indicated by a blue line on the same plan.

It was further proved that prior to the construction of the ditch complained of, the whole or greater portion of the surface water from rain or snow, which gathered in the first mentioned depression on the defendant's land, was by

Judgment.

LISTER,
J.A.

reason of the ridges diverted into the eastern depression and flowed south and east of the plaintiffs' land. The evidence shews that in the year 1889 or 1890 the defendant constructed a ditch in the line of the first mentioned depression, not only through his own land but through Campbell's land (apparently with Campbell's consent) to the marsh or swale in Campbell's land, and the effect of this drain was to collect the surface water on the defendant's land and discharge the same in accumulated volume and force into the swale or marsh on Campbell's land. It was proved that the defendant admitted that in draining to the marsh he intended the water should go to the plaintiffs' drain, and that he drained 120 acres of his land to the plaintiffs' drain. I think the evidence established that prior to the construction of the drain complained of, the plaintiffs' drains were sufficient for the purposes of their farm. It seems clear on the evidence that the marsh or swale on Campbell's land was not sufficient to contain, and did not contain, the additional water discharged into it by the defendant's drain, and in consequence thereof from time to time between 1890 and 1897 it overflowed, and the ditches of the plaintiffs' drain being inadequate to carry off the water which flowed down from the swale or marsh, the plaintiffs' land was overflowed and flooded, causing damage to their crops and otherwise.

I am unable to assent to either proposition of the learned Referee. Neither, in my judgment, can be sustained by authority.

The fact that the water was not carried in a continuous drain from the land of the defendant to that of the plaintiffs is, as it appears to me, immaterial, and affords no answer to this action.

The marsh or swale on Campbell's land into which the water from the drain complained of discharges, is as much the property of Campbell as any other part of his lot.

The contention of the defendant and the finding of the Referee that the defendant had a legal right to drain into

the swale as being a natural reservoir, would, if good law, amount to a practical confiscation of his property. Such, I venture to say, is not the law. The act of the defendant in discharging the water from the drain into this swale is undoubtedly an invasion of Campbell's rights if done without Campbell's consent. It would appear from the evidence that such consent was given. But if the marsh or swale is insufficient to hold and contain the water so discharged into it, and other proprietors should be injured by the water so brought down overflowing and flooding their lands, the defendant, in my opinion, would be answerable in damages for the injury caused thereby.

Judgment.
LISTER,
 J.A.

The question here is not one of draining into a natural watercourse, nor is it the question raised and determined in the case of *Ostrom v. Sills* (1897), 24 A. R. 526, (1898), 28 S. C. R. 485, which was an action between adjoining owners involving the legal right of the dominant owner to discharge surface water falling on his land on the land of the servient owner.

But the question is: Assuming the marsh or swale to have been insufficient to contain and hold the water so brought down and discharged into it by the defendant's ditch, and that in consequence it overflowed and flooded the lands of other proprietors, would the defendant be liable to such proprietors for the damages sustained?

The right of the defendant to drain his land by ditches is undoubted, but with this right is the correlative obligation to so construct them as to conduct the water which may be carried thereby to a proper and sufficient outlet, so that the water which may be discharged therefrom will do no injury to other proprietors. Anything short of this must, I think, be regarded as negligence for which the defendant would be answerable.

The governing principle in cases such as this is, that one cannot prevent injury to his own property by transferring that injury to his neighbour's property.

Judgment.

LISTER,
J.A.

This principle is illustrated in the case of *Whalley v. Lancashire and Yorkshire R. W. Co.* (1884), 13 Q. B. D. 131, the facts, as set out in the headnote, being these: "The plaintiff was a farmer in the occupation of lands to the north-west side of the railway, but separated from it by lands belonging to other persons; the water, by reason of an unprecedented rain storm, had so risen as to expose the defendants' embankment to danger; the defendants caused trenches to be made in the embankment by which the water was enabled to escape to the north-west side of the railway, and from thence flowed into the adjoining land, and ultimately to that of the plaintiff, where it damaged his crops. It was held that the defendants had no right to protect their property by transferring the mischief from their own land to that of the plaintiff, and that they were therefore liable." Brett, M.R., said: "But now comes this question, the danger has not been brought by a person on his own land, but it has come there—an extraordinary danger, which, if left standing there, will injure his property, but not that of his neighbour. Can he then, in order to get rid of and cure the misfortune which has so happened to himself, do something which will transfer that misfortune to his neighbour? That seems to me to be contrary to the well-known maxim that you must not, when you have the choice, elect to use your property so as to cause injury to your neighbour * * . The defendants did something for the preservation of their own property which transferred the misfortune from their land to that of the plaintiff, and therefore it seems to me that they are liable." Baggallay, L. J., said: "The defendants could have left the water to take its own course, and then, if it had produced any amount of damage to the plaintiff, I really do not see how, under the circumstances, he could have had any right against them. But, on the other hand, if, without leaving the water to take its own course, they take upon themselves to do that which they think best (whether they think it best for themselves, or their neighbour, or both), they must take the risk of that

which they do being found by the jury, however reasonably done as regards their own embankment, to have caused damage to the neighbour whose land the water so flowed over."

Judgment.

 LISTER,
 J.A.

In *Smith v. Fletcher* (1872), L. R. 7 Ex. 305, (1877) 2 App. Cas. 781, Bramwell, B., in delivering judgment in the Exchequer Court, at p. 309, said: "The defendants have artificially caused foreign water to get into the plaintiffs' mine, water which did not arise there nor get there by mere natural causes, water which got there not by the defendants not preventing, but by their causing it." See also *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330; *Attorney-General v. Tomline* (1879), 12 Ch. D. 214; *Geddis v. Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430; *Fleming v. Mayor and Corporation of Manchester* (1881), 44 L. T. N. S. 517; *Nicholl v. Mulkear Drainage Board* (1880), 6 L. R. Ir. 45.

The Chancellor in the course of his judgment in *Northwood v. Township of Raleigh* (1882), 3 O. R., at p. 358, said: "If an individual collects surface water dispersed over his land, which would naturally disappear by absorption or evaporation, and by means of a trench carries it off in a stream so as appreciably to injure his neighbours, he commits an unlawful act." See also *Stalker v. Township of Dunwich* (1888), 15 O. R., pp. 344, 345; *Township of Ellice v. Hiles* (1894), 23 S. C. R., at p. 446.

In the case of *Pettigrew v. Village of Evansville* (1870), 35 Wisc. at p. 236, Dixon, C.J., expressed himself thus: "The gist of the complaint was, that the digging of the ditch would turn the waters of the pond upon the land of the plaintiff, greatly to his injury; and that fact the Court found, and it is not controverted by counsel. And we cannot assent at all to the position of counsel, that because the ditch was not to be extended quite up to the plaintiff's line, and the water conducted upon his land in that manner, the injury was of that indirect and consequential kind for which the village is not responsible. It was an injury as direct as if such had been the mode in which the water

Judgment.
LISTER,
J.A.

was to be conducted, and there can be no rational ground for discrimination. He who sets in motion a destructive or injurious element, as fire or water upon his own land, knowing that it must immediately pass upon the land of his neighbour to his damage, commits a direct injury, and cannot, as counsel seem to suppose, claim exemption from liability, or escape the consequences, on the ground that the wind blew the fire, or the law of gravitation caused the water to run." See also *Field v. Town of West Orange* (1888), 2 Atl. Rep. 236; and *Gregory v. Bush* (1887), 64 Mich. 37.

The evidence shews that the ditch conducted and discharged into the swale on Campbell's land a very considerable volume of water which would not otherwise have come there; that the swale or marsh was not a proper and sufficient outlet for the water so brought down and discharged there; and that the plaintiffs were injured by the water from the swale overflowing and flooding their land.

What the defendant did was negligently done, and he is, therefore, answerable for the consequences of that negligence.

Applying the principle illustrated in the cited cases to the facts of the present case as proved, it seems clear that the learned Referee erred in dismissing the action.

Though the plaintiffs have been injured by the act complained of, it is not easy to estimate with any degree of exactness the amount of the damage.

During the argument at bar, it occurred to me that the chief object of the plaintiffs in bringing this action was to have their rights, in respect of the drain complained of, declared by the Court.

Having regard to all the circumstances of the case, it is in my opinion a proper one to be finally disposed of by this Court.

I think that the judgment or report of the Referee should be so varied as to enjoin the defendant from discharging the water from his land into the swale or marsh on Campbell's

land, and that the defendant should pay to the plaintiffs \$25 as damages for the injuries complained of, and their costs of the action.

Judgment.
LISTER,
 J.A.

The defendant should pay the costs of this appeal.

OSLER, MACLENNAN, and MOSS, JJ.A., concurred.

Appeal allowed.

R. S. C.

MORROW V. THE LANCASHIRE INSURANCE COMPANY.

Insurance—Fire Insurance—Mortgage—Cancellation of Policy—Double Insurance—Proofs of Loss.

A policy of insurance covering the buildings on the mortgaged property and their contents, assigned by the mortgagor to mortgagees as collateral security, cannot be cancelled by the insurance company, at the request of the mortgagees, without notice to the mortgagor.

Insurance effected by mortgagees, without the mortgagor's assent, after an attempted cancellation, does not affect the mortgagor's right of recovery on the policy effected by him.

Where insurers repudiate liability on a policy they cannot object that proofs of loss have not been furnished.

Judgment of BOYD, C., 29 O. R. 377, affirmed.

THIS was an appeal by the defendants from the judgment of BOYD, C., reported 29 O. R. 377. Statement.

The action was brought upon an insurance policy issued by the defendants to the plaintiff, and the defences were that the policy had been cancelled at the request of the mortgagees of the plaintiff's land, to whom any loss under the policy was payable, and that proofs of loss had not been furnished. The facts are stated in the report below.

The appeal was argued before BURTON, C.J.O., MACLENNAN, MOSS, and LISTER, JJ.A., on the 30th of November, 1898.

W. M. Douglas, and C. S. MacInnes, for the appellants. At the time of the surrender of the policy the Hamilton Provident Loan Company had the sole right to sue thereon

Argument. and all liability on the part of the appellants ceased from the time the policy was surrendered by that company. If there was any breach of contract or trust on the part of that company in surrendering the policy the respondent may have a claim against them, but this cannot affect the right of the appellants to treat the risk as at an end. The mortgagees had the right to insure and the subsequent insurance was effected on behalf of the respondent and with his knowledge, and even if the appellants' policy had not previously been surrendered this subsequent insurance would have voided it. The learned Chancellor treats the case as if the respondent had remained the holder of the policy and as if the loss only had been made payable to the mortgagees, but the respondent had made an absolute assignment of the policy and had ceased to have any interest therein from the time of the assignment, except so far as related to the application of the money which might become payable under the policy. The case of *Caldwell v. Stadacona Fire and Life Insurance Co.* (1883), 11 S. C. R. 212, and the other cases referred to by the learned Chancellor, have no application to this case. Apart altogether from the question of surrender and further insurance the appellants are entitled to succeed, because the respondent did not before action comply with, and never even made any attempt to comply with, the statutory condition as to proofs of loss. The distinction between a statutory obligation of this character and a condition imposed by the insurers has not been observed by the learned Chancellor. The appellants never waived compliance with this condition and the fact that they remained silent is not sufficient to disentitle them to rely upon it. The respondent was bound to see that the clear provisions of the law in this respect were complied with before he commenced his action: *Robins v. Victoria Mutual Insurance Co.* (1881), 6 A. R. 427; *Logan v. Commercial Union Ins. Co.* (1886), 13 S. C. R. 270; *McKean v. Commercial Union Assurance Co.* (1882), 21 N. B. 583; *Mulvey v. Gore District Mutual Fire Ins. Co.*

(1866), 25 U. C. R. 424. At the least the defendants are entitled to credit for the \$240 received by the loan company in respect of insurance upon the plaintiff's building and credited to him in their account. Argument.

George Wilkie, for the respondent. The assignment of the policy by the respondent to the mortgagees was made as collateral security only, and there was no change in the contract of insurance. The respondent still remained the assured and the appellants the insurers. The effect of the assignment was merely to direct the appellants to pay the loss, if any, to the mortgagees: *McPhillips v. London Mutual Fire Insurance Co.* (1896), 23 A. R. 524; *Anderson v. Saugeen Mutual Fire Insurance Co.* (1889), 18 O. R. 355. The termination of the contract of insurance could be effected only under sec. 169, sub-sec. 19, of R. S. O. ch. 203, and in strict compliance with the terms of that subsection. The notice in this case was not given to the assured, was wholly oral, and was notice of an immediate termination; it therefore was ineffectual: *Bank of Commerce v. British America Assurance Co.* (1889), 18 O. R. 234; *Barnes v. Dominion Grange, etc., Association* (1895), 22 A. R. 68; 25 S. C. R. 154. The mortgagees were not the owners of the policy and could not surrender it, nor could they commit a breach of the condition against reinsurance. An insurance to be a breach of the condition against reinsurance must be by or for the assured and of his interest: *Dafoe v. Johnston District Mutual Insurance Co.* (1857), 7 C. P. 55; *Gilchrist v. Gore District Mutual Fire Insurance Co.* (1873), 34 U. C. R. 15. The respondent duly notified the appellants of the loss and the appellants replied that there was no subsisting contract of insurance and that they were not liable. Under such circumstances proofs of loss are not necessary: *Goodwin v. Lancashire Fire Insurance Co.* (1873), 18 L. C. Jur. 1; *Robins v. Victoria Mutual Insurance Co.* (1881), 6 A. R. 427. The respondent was the proper person to bring the action: *Prittie v. Connecticut Fire Insurance Co.* (1896), 23 A. R. 449, and

Argument. has nothing to do with the amount received by the loan company.

W. M. Douglas, in reply.

March 14th, 1899. BURTON, C.J.O. :—

This action was brought upon a policy of insurance under seal, dated in October, 1883, for three years, insuring the plaintiff's barn and its contents against fire. The value of the barn was stated to be \$600, that of the contents \$600 also.

After effecting this policy the plaintiff borrowed from the Hamilton Provident Loan Company the sum of \$1,500, and to secure the repayment executed on the 1st of July, 1895, a mortgage on his farm, including the dwelling house, barn and other property mentioned in the policy, covenanting to insure for \$1,000, said to be the full insurable value of the property at that time.

Presumably in compliance with that covenant the plaintiff, on the 17th of August, 1895, assigned the policy to the loan company, who, on the 13th of September following, procured the assent of the company through its local agent at Hamilton.

In the assignment to the company, the word "purchasers" is struck out and the word "mortgagees" written above it.

The insurance company had shortly before decided not to take risks on farm property, and, on the 7th of October, wrote to their agent in Hamilton to take steps to cancel the policy, and on the 14th of October the manager of the loan company wrote to the plaintiff advising him that the defendants had cancelled the policy and that the company had effected an insurance with another company, and enclosing an application to be completed and returned at once.

The plaintiff took no notice of this letter, and in the month of January following the loan company wrote requesting him to remit at once the arrears, amounting to

\$91.45. It does not appear how this amount was arrived at and whether any statement accompanied it, and in replying to it the plaintiff expressed surprise at the amount, contending also that his policy in the defendant company was still in force and that the loan company had no right to effect a further insurance whilst that was still in existence.

In reply the loan company wrote that the defendants had misinformed him if they had written that the policy had not been cancelled, referring again to the application and complaining that it had not been returned, and enclosing a new one with an intimation that, unless it was returned within ten days properly completed, they would instruct an agent to go to his place and fill out the application, and charge the agent's expenses to the plaintiff's account.

The plaintiff, in his reply, took no notice of the threat of the company and said he had no money to pay the arrears, but promised to pay soon and allow interest for the delay.

On the 20th of March the loan company sent a further application.

On the 2nd of June they forwarded another application to their own agent and asked him to go out to get it completed. The plaintiff, however, refused to sign it.

On the 23rd of September in the following year the fire occurred, and a claim was then made by the plaintiff on the defendant company.

The defendants' general manager wrote an answer expressing surprise at a claim being made upon them, as although their company had at one time carried some insurance, it had long since expired, and suggesting that, as the loan company appeared to have some interest in the property, by writing to them he might possibly find out that they had insured in some other company.

This was replied to by the plaintiff's solicitor intimating that he could not understand how the defendants considered themselves at liberty to cancel the policy, as the plaintiff had no notice and had never received any rebate.

In this letter the solicitor says that in the face of their repudiation of liability he had not made out the proofs of

Judgment.

BURTON,
C.J.O.

Judgment.

BURTON,
C.J.O.

loss, but that he was prepared to do so at once if they desired it.

The manager wrote that the plaintiff had assigned all his right, title and interest in the policy to the loan company, and that as they were the parties interested in the policy they had paid the rebate to them.

This ended the correspondence, and on the 13th of January, 1897, this action was commenced.

The defendants submit that the assignment to the loan company was assented to by them, subject to all the terms and conditions contained in the policy, and that they had terminated the policy as provided by the Insurance Act, and that if it was not terminated then that it was avoided by a subsequent insurance without their assent, and they rely further on the absence of proofs of loss.

The action was tried before the learned Chancellor, who found in favour of the plaintiff, allowing him \$300 on the barn, \$230 on the crops, and \$130.65 on some tools.

The appeal is against that decision. It is said that the company do not recognize any but absolute assignments, and that they do not give assent to assignments of policies as collateral security. The answer, whatever may be their usual practice, is that it has been given in this case, and their attention pointedly drawn to the fact that it is only as collateral security that it was assigned. The effect of the decision in *McPhillips v. London Mutual Fire Ins. Co.* (1896), 23 A. R. 524, has been misapprehended. Here the plaintiff remained the owner of the property assured, and the effect of the assignment of all his interest in the policy was to give to the mortgagees the right to receive the insurance money, and in the event of loss to grant a valid discharge therefor.

Here, therefore, the company had express notice that the loan company were mortgagees only and that the plaintiff was the assured, and they could not therefore exercise their right to cancel the policy except by a strict compliance with the terms and conditions upon which it is admissible; that is, by notice to him and the payment to him of the unearned portion of the premium.

I agree, therefore, with the learned Chancellor, that the surrender by the loan company was invalid and not binding on the plaintiff.

Judgment.
BURTON,
C.J.O.

The plaintiff was no party to the subsequent insurance effected without his authority and against his will.

Then as to the objection that the action is prematurely brought, as no cause of action arises until after the expiration of thirty days from the proofs being furnished.

Some language used by me in the case of *Robins v. Victoria Mutual Insurance Co.* (1881), 6 A. R. 427, has been referred to as shewing the desirability of strictly enforcing these conditions, but that case turned upon its peculiar facts. Conceding that the delay there arose from mistake or accident within the terms of the Act, I thought that it was incumbent upon the plaintiff to take prompt proceedings after the mistake was discovered, but the majority of the Court were of opinion that the misapprehension of the agent to prepare the proofs in time, being either a mistake or an accident, excused the strict compliance as to the thirty days' limit; that the transgression of that limit having been condoned by the statute, it fixed no further limit, but merely required it to be done "as soon as practicable," and that as the statute imposed no penalty for the second default, although the delay was for over two months, the Court had no power to do so.

Here it is said that there can be no waiver of a condition unless in writing, but I should rather put it that the defendants have estopped themselves, by their conduct before the expiration of the thirty days, from insisting upon a strict compliance; and the making no reply to the plaintiff, when he offered still to supply the proofs if the defendants desired it, should, I think, equally estop them from insisting on the benefit of any defence founded on this condition.

I agree with the learned Chancellor that the disposition of the amount paid by the other insurance company to the loan company is not before us, and I prefer expressing no opinion about it.

Judgment. MACLENNAN, J. A. :—

MACLENNAN,
J.A.

I agree with the judgment of the learned Chancellor, and also with the judgment of the Chief Justice. The only point on which there could be any question is whether the plaintiff should give credit for the \$240 received by the loan company from the other insurance company. Neither of those companies is before us, and in their absence we cannot presume to determine their respective rights, or the questions which may arise between them. Of course if the consent of these companies can be obtained to the \$240, less the premium paid, being credited on the plaintiff's mortgage there can be no objection to the judgment being reduced by the amount of that credit, otherwise the judgment should stand as at present.

The appeal should in any case be dismissed.

Moss, J.A. :—

I am inclined to think that credit should be given for \$240, and I desire to guard against being understood as so far agreeing to the conclusion arrived at by the other members of the Court.

LISTER, J. A. :—

I think that the appeal should be dismissed.

Appeal dismissed.

R. S. C.

REGINA V. REID.

Appeal—Order of Divisional Court Quashing Conviction—Constitutional Question—Certificate of Attorney-General—R.S.O. ch. 91, sec. 3—Inadvertence—Quashing Appeal—Costs.

The Attorney-General certified his opinion, pursuant to sec. 3 of R. S. O. ch. 91, that the decision of the High Court quashing a conviction made under an Ontario statute involved a question on the construction of the British North America Act, and an appeal from such decision was brought on in the regular way; but, as it plainly appeared to the Court of Appeal that the decision involved no such question, and the certificate of the Attorney-General appeared to have been granted inadvertently, in consequence of an authentic copy of the reasons for the judgment of the Court below not having been brought before him, the appeal was quashed, and with costs to be paid by the prosecutor, the appellant, whose proceeding was in the nature of a *qui tam* action.

APPEAL by the private prosecutor from an order of Statement.
a Divisional Court quashing a summary conviction of the defendant by three justices of the peace for an alleged breach of the Lord's Day Act. The defendant was a servant of the Grand Trunk Railway Company of Canada, and the offence of which he was convicted was that of pursuing his ordinary calling, namely, shovelling grain in an elevator, on a Sunday.

The right of appeal in such a case is governed by the following section of R. S. O. ch. 91:—

3.—(1) An appeal to the Court of Appeal shall lie from a judgment or decision of the High Court, or a Judge thereof, upon an application to quash a conviction made under a statute of the Legislature of Ontario creating an offence punishable by summary conviction before a justice * * whether the conviction is quashed * * or the application is refused:

Provided that the Attorney-General for Canada or the Attorney-General for Ontario, certifies his opinion that the decision involves a question on the construction of *The British North America Act*, and that the same is of sufficient importance to justify the case being appealed.

Statement. The Attorney-General for Ontario gave a certificate in accordance with the above proviso, and the proceedings in the Divisional Court were certified to the Court of Appeal in the regular way.

The appeal came on for hearing before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 1st of June, 1899.

E. E. A. DuVernet, for the defendant, objected that the decision of the Court below involved no question on the construction of the British North America Act, and that an appeal did not lie.

A. E. O'Meara, for the appellant, contended that the decision of the Court below could be supported only on the ground that the Grand Trunk Railway Company of Canada, as a Dominion corporation, was not subject to the Lord's Day Act, and that a constitutional question was therefore directly involved, and he also contended that as a certificate had been granted by the Attorney-General, the appeal should be heard.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

THE COURT intimated that the appeal must be quashed.

O'Meara contended that there should be no costs, citing *Regina v. Edwards* (1892), 19 A. R. 706, 711; *Teskey v. Neil* (1893), 15 P. R. 244, 248; *In re Bombay Civil Fund Act* (1888), 40 Ch. D. 288.

The judgment of the Court was delivered on the following day by

OSLER, J.A.:—

The written judgment of the Divisional Court on the motion to quash the defendant's conviction having been handed in, it appears quite plainly that the decision

involves no question on the construction of the British North America Act. It involves nothing but a question of the construction of the Sunday Act, and its application to any railway corporation and its servants.

Judgment.

OSLER,
J.A.

The certificate of the Attorney-General, therefore, appears to have been granted inadvertently, in consequence of the authentic copy of the judgment not having been brought to his attention.

We have looked at the cases cited by Mr. O'Meara on the question of costs; they, however, decide nothing which should induce us to take the case out of the general rule; and it would be a hardship on the respondent if, in an unsuccessful proceeding which partakes of the nature of a *qui tam* action, the prosecutor should not be ordered to pay the costs.

The appeal is, therefore, quashed, with costs to be paid by the prosecutor.

Appeal quashed.

R. S. C.

WILSON V. BOULTER.

Master and Servant—Workmen's Compensation for Injuries Act—Defect in Plant—Damages—Infant—Mother's Services and Expenditure.

The infant plaintiff, who was employed in a canning factory, was injured by the explosion of a retort or boiler in which vegetables were being cooked. The cooking was done by steam which was forced through the boiler, there being an intake pipe and an escape pipe which had to be adjusted by hand and no safety valve or automatic escape pipe. There was no evidence of the cause of the explosion and the defendants contended that it was due to a latent defect in the boiler :—

Held, that it might properly be inferred that the explosion was caused either by the negligence of the person whose duty it was to adjust the escape pipe, or by the absence of the safety valve, and that in either view the defendants were liable.

Judgment of ROSE, J., affirmed.

Held, also, that the mother of the infant could not recover for her services in attending upon him during his illness and for moneys expended and liabilities incurred by her for medical attendance, nursing and supplies, she not being in the legal relationship of master to him or under legal liability to maintain him.

Judgment of ROSE, J., reversed.

Statement. THIS was an appeal by the defendants from the judgment at the trial.

The following statement of the facts is taken from the judgment of MOSS, J.A. :—

The plaintiff Henry M. Wilson, a lad between seventeen and eighteen years of age, was in the employ of the defendant at his canning factory in Picton during the summer of 1897, and until the 13th of October of that year. On that day he was seriously injured through the bursting of the door of one of the retorts in the defendant's factory.

This action was brought by him—his mother, Martha Jane Wilson, being named as his next friend—to recover damages from the defendant. The statement of claim alleged that the plaintiff Henry M. Wilson was at the time of the injury a workman and the defendant an employer within the meaning of "The Workmen's Compensation for Injuries Act, 1892," and amending Acts, and proceeded to set forth in detail a case of defects in the defendant's works, machinery or plant, and negligence of a person in

superintendence, within the provisions of the above Acts, Statement.
concluding with an allegation that the notice required by the Act had been duly given.

In addition there was a short paragraph to the effect that the plaintiff submitted that the defendant was liable for damages at common law as well as under the Acts.

There was a further allegation that Martha Jane Wilson had suffered damage by loss of service of the said Henry M. Wilson, and had been put to great expense for maintenance, medical attendance, medicine, nursing, and trouble by reason of the injuries.

Damages were claimed on behalf of the plaintiff Henry M. Wilson to the extent of \$2,000, and on behalf of Martha Jane Wilson to the extent of \$1,000.

In other words, although Martha Jane Wilson was not a party plaintiff in the action, but merely appeared as the next friend of the plaintiff, there was included in the statement of claim a count for injury to her son *per quod servitium amisit*, and a claim for damages in respect thereof.

The defence was in substance a denial of the alleged defects and negligence, and an allegation that the plaintiff was guilty of contributory negligence, or, if he was not, that the injuries were the result of mere accident for which the defendant could not be held liable.

The action came on for trial at the Picton Assizes. Upon the opening of the case the plaintiff's counsel applied for permission to amend by adding the name of Martha Jane Wilson as a party plaintiff. The application was not then disposed of, the trial Judge saying he would consider it.

The evidence shewed that the retort which exploded was one of a number used by the defendant in the process of canning fruits and vegetables at his factory. Its office was to heat or cook the articles which it was intended to can, to the proper degree. The heat was supplied by steam from a large boiler, which usually carried a head of from seventy-five to eighty pounds. From it the

Statement. steam was carried to the retort through a small pipe in which there was what is called a globe valve or stop-cock near the retort. From the top of the retort there was another pipe, also with a globe valve, for the escape of steam from the retort. The articles to be treated were placed in sieves in the retort, and the steam was then turned on from the boiler through the small pipe until the guage or indicator on the retort shewed the number of pounds of steam deemed necessary to produce the proper degree of heat. The escape pipe at the top was then opened sufficiently to promote a circulation of steam and prevent the pressure in the retort getting beyond the proper degree. This operation was performed by a man in charge of the retorts, whose duty it was to see that the supply of steam to each retort was kept to the proper degree. This was essential as a precautionary measure to prevent an undue accumulation of steam, followed by a possible explosion, and also as guarding against the articles being spoiled by overheating or burning. It called for and required close attention on the part of the man in charge.

On the day of the accident the retort in question was being used for cooking or heating pumpkins. It, with others, was in charge of one Wall, who was shewn to be a competent man. The plaintiff Henry M. Wilson was engaged in carrying cans filled with the prepared substance from a room called the canning-room to a room called the capping-room, where the cans after having passed through a process of wiping were capped or closed. In order to go from the one room to the other the plaintiff had to pass through the room where the retorts were—called the bath-room. He was pushing a truck, used for carrying the cans, and going from the capping-room towards the canning-room when just as he entered the bath-room the retort exploded. He was very badly scalded by the steam and the heated pumpkin. An examination shewed that the door of the retort had been blown out, and that one of the clamps or lugs, by means of which it was fastened or screwed into its place, had

broken in two. On inspection there appeared in the under side of the clamp a "blow hole" or defect in the iron by which it was no doubt weakened, but this defect was not readily apparent. Statement.

The retort had shortly before been tested up to twenty pounds pressure. The maximum pressure required for the process of cooking the pumpkins was fifteen pounds, and it was Wall's duty to see that it did not exceed that. If he saw that it was going beyond that he could, by opening the globe valve at the top, immediately relieve the pressure, or he could shut off the intake. But neglect to observe these precautions was liable to produce a sudden rise of steam at any time, attended with dangerous consequences.

Judgment was reserved, and was delivered on the 20th of May, 1898, as follows:—

ROSE, J.:—

The infant plaintiff was where he was at the time of the injury, in the discharge of his duty, and in obedience to instructions. A faint attempt was made to shew that he was disobeying instructions at the moment, but the evidence was to the contrary.

The plaintiffs' case is that the accident happened from neglect on the part of the defendant, first, in not having an automatic safety valve on the retort, and secondly, neglect on the part of the man in charge in not watching the steam gauge, and in not regulating the supply of steam so as to prevent undue pressure. The plaintiffs' position was that if the defendant chose to carry on his business without the use of the automatic safety valve, and to rely upon a safety valve worked by hand, this cast upon him the duty of having the steam gauge watched so closely as to ascertain any increase in the pressure, and if necessary, the duty of watching such valve from moment to moment and every moment. In other words, if he chose to do without an automatic safety valve, he must take such care as would prevent an accident occurring, which might have been prevented by the use of such a valve.

Judgment.

ROSE, J.

The defendant's case was that the automatic safety valve was liable to get out of order; that the safety valve which he used was on the whole more reliable; that he could regulate the amount of steam coming in through the supply pipe and the amount of steam going out through the safety valve, so that when once the steam gauge marked a pressure of say fifteen pounds, no more steam could go into the retort than would find an exit through the safety valve, save what would be sufficient to keep the pressure to such point; that the man in charge had regulated the supply; that the steam gauge was in working order; that the opening through the safety valve through which the steam escaped, was also regulated, and that the pressure from the boiler was regular, and did not exceed say eighty pounds, at which the pressure through the retort was set. He attributed the accident to weakness in one of the clamps which held the door, in which was found what was called a blow-hole; his theory being that the blow-hole being in existence, there would be constant disintegration until the clamp became so weak that the pressure at fifteen pounds was too great for it to resist; and he contended that there was no evidence that the pressure at the time in question exceeded say fifteen or twenty pounds. A test had been made up to twenty pounds, so that I must take it that the clamp was sufficiently strong to resist pressure up to twenty pounds. There was no evidence before me, of such an expert character that I feel justified in relying upon it, as to what pressure the clamp in its condition at the time of the accident was unable to resist. I do not know, and of course cannot tell from my own knowledge, what the resisting strength of the iron in the clamp was; so that I cannot adopt the theory of the defendant that the accident happened from the breaking of the clamp under a pressure not exceeding fifteen or twenty pounds. The evidence of the test up to twenty pounds is against such a theory. If everything had been in normal condition and in working order, it is manifest, from the statement of the defendant and his witnesses, that the accident could not have

happened. The accident did happen, something, therefore, must have been out of order. There must have been a want of proper regulation at some point. I think this is a case which calls upon the defendant to explain. Either there was a sudden rise in pressure from the boiler, or the valve in the supply pipe had not been regulated, or the valve through which the steam escaped had not been regulated, or had become clogged and closed, and in any event the eye of the person in charge could not have been upon the steam guage so as to mark the sudden rise in the pressure. There, therefore, must have been some lack of ordinary skill or care, and if so, there was negligence. The man in charge was called, but I do not feel safe in relying upon his evidence. He was contradicted by Williams as to his having made a statement to him that the pressure had risen to forty pounds. He was contradicted by another witness who stated that he had admitted negligence in not adjusting the valve in the supply pipe. While these contradictions do not prove either that the pressure had risen to forty pounds, or that he had neglected to regulate the valve in the supply pipe, they are contradictions of such a material character that I think I must discard his statements as far as they are not consistent with the history of the case. First, I think that it was an act of negligence on the part of the defendant not to have an automatic safety valve. I do not think it is any answer to say that such a valve would get out of order. This would require a little more care in watching it, and cleaning it out frequently, but being unclogged, and in order, it would serve in an emergency, such as the one in question. The absence of such a valve threw upon the man in charge so high a degree of care that a slip on his part was likely to cause a very serious accident, as in the case in question. Of course, the accident happened by reason of a sudden rise in the pressure. That was possible if the valve in the supply pipe had not been adjusted; it was possible if the valve where the steam escaped had not been adjusted; or if such valve had been

Judgment.

ROSE, J.

Judgment.

ROSE, J.

clogged. The man in charge stated that he saw the steam guage within two minutes before the accident. If he is telling the truth as to that, the pressure must have risen within the two minutes. If there had been an automatic safety valve such pressure would have been relieved. In the absence, therefore, of any cause assigned or shewn, which, if conditions had been normal, would have resulted in the accident, I must conclude that the man in charge was not attending to his duty; that he had neglected either adjusting one or both valves, and that he had not watched the steam guage sufficiently closely to detect the rise in pressure, and so have been in a position to either turn off the steam or afford a larger opening for its escape.

I have looked at the cases cited by counsel, and feel clear that this is a case where the defendant must account for the cause of the accident.

The cases are collected in 2 Roscoe's Law of Evidence, 16th ed., p. 737. I extract the following clause: "But the accident may take place under such circumstances as to be *prima facie* evidence of negligence, for the happening of something that would not happen if ordinary skill and care were used is evidence of negligence," citing *Gee v. Metropolitan R. W. Co.* (1873), L. R. 8 Q. B. 161, 175, *per* Brett, J.

Again, I quote from *Bridges v. North London R. W. Co.* (1871), L. R. 6 Q. B. 377, 391: "There may be cases of accidents the mere proof of which supplies the necessary evidence of negligence, for the nature of the accident may be such that it could not be caused otherwise than by the defendants' negligence. There, as has been said, *res ipsa loquitur*."

I think, therefore, the plaintiffs must recover. As to the amount of damages, I think \$1,500 is as much as I ought to order the defendant to pay. I divide that as follows:—I give to the mother, to cover the expenses for which it seems to me she is liable, or which she has paid, \$800, and to the son \$700. The master is, of course, entitled to such

damages as he sustains from the injury to his servant: see *Dixon v. Bell* (1816), 1 Stark. 287, where the amount of the surgeon's bill was allowed; the physician's fees there were disallowed because they had not been paid, and the physician could not enforce payment. There is no such distinction here. See also *Collins v. Lefevre* (1858), 1 F. & F. 436; and Smith's Master and Servant, 4th ed., p. 170 *et seq.*

Judgment.

ROSE, J.

There will be judgment for the plaintiffs with costs.

By the formal judgment it was ordered and adjudged that the plaintiff Henry M. Wilson should recover against the defendants the sum of \$700, to be paid into Court and paid out to him with accrued interest on his attaining his majority; that the plaintiff Martha Jane Wilson should recover against the defendants the sum of \$800; and that the defendant should pay to the plaintiffs their costs of the action forthwith after taxation thereof.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 7th and 8th of December, 1898.

Wallace Nesbitt, and *Glyn Osler*, for the appellants. The plaintiffs have failed to shew negligence and the action should be dismissed. The evidence points strongly to the conclusion that the accident resulted from a latent defect in the retort, and as that retort was of the usual character for the purpose for which it was being used the defendants are not liable: *Montreal Rolling Mills Co. v. Corcoran* (1896), 26 S. C. R. 595; *Cowans v. Marshall* (1897), 28 S. C. R. 161; *Bridges v. North London R. W. Co.* (1871), L. R. 6 Q. B. 377. At any rate the mother of the infant plaintiff is not entitled to recover. She is not in the legal relation of master to her son and is not responsible for his maintenance.

Clute, Q.C., for the respondents. The plaintiffs have shewn that the accident was caused either by the negli-

Argument. gence of Wall or by the absence of a safety valve; in either event the defendant is liable. At the least, enough has been shewn to cast the onus upon the defendant, and he has failed to shew what in fact caused the accident if it was not caused in one of the modes contended for by the plaintiffs: *Badcock v. Freeman* (1894), 21 A. R. 633; *Webster v. Foley* (1892), 21 S. C. R. 580; *Weblin v. Ballard* (1886), 17 Q. B. D. 122. The mother is entitled to recover for the services rendered and expenditure made and liabilities incurred by her: *Shearman and Redfield on Negligence*, 5th ed., secs. 115, 763.

Wallace Nesbitt, in reply.

May 9th, 1899. OSLER, J.A.:—

The plaintiff was injured by the explosion of a retort on the premises of the defendant, his master. One question is whether there was actionable negligence on his part to which the explosion ought justly to be attributed. On this question the learned trial Judge finds against the defendant holding that there was negligence in omitting to have the retort fitted with the common and inexpensive device known as an automatic safety valve, which would have permitted the escape of the steam in the retort when the pressure had reached the point necessary for the purpose of cooking the vegetables in the retort, or at any other point beyond which it might not have been considered safe to allow it to rise. He also held that there was negligence on the part of one Wall, the foreman or superintendent, whose duty it was to adjust the intake and escape valves of the retort, in omitting to watch the steam guage, and to be in position to regulate the pressure of the steam in the retort. The learned Judge was of opinion that there was evidence which warranted him in finding that the explosion was attributable to one or the other, or both, of these grounds of negligence. The defendant contended that it happened in consequence of a hidden defect in one of the lugs by which the door of

the retort was fastened, which made it liable to break under the strain of the normal steam pressure (fifteen pounds), and that it is mere guess work to attribute the accident to any other cause.

We do not know from the evidence what strain the retort was capable of bearing, assuming that there had been no hidden defect in the lug. But we do know that the working pressure was fifteen pounds, that it ought not to have been allowed to exceed that, and that it had been tested as high as twenty pounds. I think the learned Judge was therefore justified in inferring that at the time of the accident the pressure had for some reason exceeded this.

How did that happen? There is considerable evidence that in the absence of an automatic safety valve such things are unsafe, or to put it in another way, that the presence of such a valve adds very much to the safety of working them by eliminating the chances of the overseer's negligence. I think it a very reasonable and probable inference that if there had been such a valve in this instance the steam would have escaped, and that there would have been no explosion. On the other hand if the defendant had made up his mind to work his retorts without them, a constant care and watchfulness on the part of Wall, whose duty it was to adjust the valves and regulate the intake and exit of the steam, was imperatively demanded, and here again there is evidence that the duty of superintendence was neglected, and, if so, it is also a probable inference that the explosion resulted from that neglect.

The plaintiff proves the explosion, and proves the absence of something, either the automatic safety valve or care on the part of Wall, which would probably have prevented it. Considering the dangerous nature of the agent which was employed in its power of causing an explosion if care and skill were not employed in its management, I think the plaintiff made out a case upon the evidence which warranted the learned Judge's findings. Having read the evidence and heard a very full analysis of it

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

in the counsel's argument, I am prepared to agree with those findings, and to hold that the plaintiff is entitled to recover under the provisions of the Workmen's Compensation for Injuries Act, R. S. O. ch. 160, sec. 3, for (1) defect in the condition or arrangement of machinery or plant, or (2) negligence of a person in his employer's service who had the superintendence of the retorts entrusted to him, while in the exercise of such superintendence.

The next question concerns the right of the plaintiff's mother, who has been added as plaintiff, to recover for her own services in nursing him, and moneys expended by her, or liabilities incurred by her in paying nurses hired by her, and for other charges and expenses, including, I think, doctor's bills, to which she has been put during the plaintiff's illness and connected therewith. For all these the learned Judge has allowed her \$800.

I have much difficulty in ascertaining any precise legal ground on which the mother can recover anything. For first, in our law, whatever may be the case in some of the States of the country to the south of us, the mother would seem to stand in a different position from the father as regards the right to the services of her minor children. It is, as Tindal, C.J., puts it, in *Grinnell v. Wells* (1844), 7 M. & G. 1033, the invasion of the legal right of the master to the services of his servant that gives him the right of action for beating his servant, or of course for any injury inflicted upon him by the negligence of a third person; citing *Robert Mary's Case*, 9 Rep. 113a. The loss of service is the gist of the master's action. "The master has not any damage by the personal beating of his servant, but by reason of *per quod*, viz., *per quod servitium amisit*, so that the original act is not his cause of action, but that consequent upon it, viz., the loss of service, is the cause of his action." And it is on that ground that the father, who, as master, is entitled to the services of the child, can recover expenses necessarily incurred by him in the cure and care of his servant, in consequence of the injury: see *Cuming v. Brooklyn City R. W. Co.* (1888), 109 N. Y. 95.

The mother would appear to have no such right either at the Common Law, or, so far as I am aware, by statute: Bla. Com. Bk. 1, p. 453; Schouler's Domestic Relations, 4th ed., sec. 255; *Commonwealth v. Murray* (1812), 4 Binney 487; *Whipple v. Dow* (1807), 2 Mass. 415; *Furman v. Van Sise* (1874), 56 N. Y. 435, 445, *per* Allen, J.; *Muckleroy v. Burnham* (1845), 1 U. C. R. 357; *Hicks v. Ross* (1865), 25 U. C. R. 50; *Smart v. Hay* (1862), 12 C. P. 528; Am. and Eng. Encycl. of Law, vol. 14, 755-757; 17 *ib.* 378-380. How far the right of the father would extend in a case like the present when the child is as it were emancipated, no longer supported by the father, earning wages for himself under his own contracts, may be doubtful: *Delesdernier v. Burton* (1866), 12 Gr. 569; *Perlet v. Perlet* (1857), 15 U. C. R. 165; *Ferris v. Fox* (1854), 11 U. C. R. 612; Division Courts Act, R. S. O. ch. 60, sec. 78; *Rex v. Chillesford* (1825), 4 B. & C. 94; *Farrell v. Farrell* (1868), 3 Houston (Del.) 633; *Manchester v. Smith* (1831), 12 Pick. 115; *Nightingale v. Withington* (1818), 15 Mass. 272; *Dierker v. Hess* (1873), 54 Mo. 246.

Judgment.

OSLER,
J. A.

And secondly, the son, though living with the mother, was not in fact in her service, but in that of the defendant. The action for injuries sustained in the master's service given by the statute to the servant against the master, can hardly be extended to a claim by the mother for services or other expenses incurred in curing or caring for that servant. I am therefore of opinion that no action lies here on behalf of the mother, there being no relation of mistress and servant between her and her son, and consequently no legal right arising out of such relation, or any obligation to incur the expenses which form the subject of her claim.

Moss, J. A. :—

The defendant has appealed on the grounds that the evidence established no case of negligence either at Common Law or under the Acts, and no case of defective

Judgment.

Moss,
J.A.

works, machinery or plant, so as to render him liable for damages; that the damages are excessive; and that in any case Martha Jane Wilson is not entitled to recover, and that the amount of the judgment should be reduced to the sum of \$700 awarded to the plaintiff Henry M. Wilson.

It was sworn that at the time of the occurrence neither Wall himself nor his assistant Bowles was in the bath-room. Bowles had gone away with Wall's knowledge and assent, and it was the latter's duty to attend to the retorts. But it was shewn, and the learned trial Judge found, that Wall had not watched the steam gauge sufficiently closely to detect the rise in pressure, and to have been in a position to either turn off the steam or afford a larger opening for its escape.

The accident was owing to Wall's negligence in not attending to his duty at the time, and but for the Workmen's Compensation Act the defence of common employment and the carelessness of a fellow-workman afforded a sufficient answer to the plaintiffs' claim.

But, under the Act, the case assumes a different complexion against the defendant.

The retort as fitted up and used with the globe valve was capable of being so used that with reasonable care and attention on the part of a competent person in charge an accident from over pressure of steam was unlikely to happen. But everything depended upon the care and attention of a competent person.

The retort was procured from well-known and competent manufacturers and was placed in charge of a man capable of managing it.

And so far the defendant had fulfilled the requirements of the law. But as furnished by the manufacturers the retort had provision made for placing on it a safety valve in the shape of an automatic spring valve which being set at a degree of pressure sufficiently low to blow off upon any rise beyond the indicated degree would prevent the possibility of the accumulation exceeding the resisting power of the retort.

In order to have secured almost complete safety from the result of possible negligence on the part of the person in charge, such a safety valve was required in addition to the globe valve. This was not attended to and its absence was a defect in the works, machinery or plant, as found by the learned trial Judge.

Judgment.

Moss,
J.A.

The evidence also supports, as shewn above, the finding that there was negligence on the part of Wall.

And on these grounds the case falls within the Workmen's Compensation Act.

But this being the case the claim for damages must be confined to the plaintiff Henry M. Wilson alone. The mother's action *per quod servitium amisit* does not lie under the Act which gives compensation to the workman only, except in the case of his death, when it is awarded to his representatives.

Even if this were not the case, yet, as pointed out by my brother Osler, the mother is met with many difficulties in seeking to maintain an action on her own account in respect of the injury done to her son.

The result appears to be that the judgment must be confined to the amount awarded to the plaintiff Henry M. Wilson.

The appeal should be allowed as to Martha Jane Wilson without costs and dismissed as to Henry M. Wilson with costs, the judgment below to be varied accordingly.

BURTON, C. J. O., MACLENNAN, and LISTER, JJ.A., concurred.

Appeal allowed in part.

R. S. C.

MACKENZIE V. TOWNSHIP OF WEST FLAMBOROUGH.

Drainage—Want of Repair—Act of God.

Where a drain is out of repair and lands are injured by water overflowing from it the municipality bound to keep it in repair cannot escape liability on the ground that the injury was caused by an extraordinary rainfall unless it is shewn that even if the drain had been in repair the same injury would have resulted.

Judgment of the Drainage Referee reversed.

Statement. APPEAL by the plaintiffs from the judgment of the Drainage Referee.

The following statement of the facts is taken from the judgment of LISTER, J.A. :—

The action was commenced on the 2nd of September, 1898, and was brought to recover damages, which the plaintiffs allege they have sustained, occasioned by the overflow of water upon their property, consisting of the south half of lot 12 in the 5th concession of the township of West Flamborough, caused, as they allege, by the neglect of the defendants to maintain and keep the drain mentioned in the proceedings in repair, and for a mandamus.

The defendants, by their statement of defence, deny that the damage complained of was caused by the overflow of water from the drain, and they aver that in any event they are not liable for the damage (if any) sought to be recovered. They assert that if any damage was done to the plaintiffs' lands and crops, it was caused by exceptionally heavy rains and from surface water, and not from the overflowing or flooding of the drain.

The action came on for trial before the Drainage Referee, to whom it had been referred under the provisions of the Drainage Trials Act, and the learned Referee, at the close of the evidence, pronounced judgment dismissing the action, on the ground that the damage complained of was caused by *vis major*.

The facts were these: The drain complained of was constructed by the defendants in the year 1889 under the authority of the drainage provisions of the Municipal Act then in force, and of a by-law of the council of the defendant corporation passed on the 18th day of January, 1889, the schedule to which shews that the plaintiffs' land was assessed for benefit. Statement.

As early as the month of November, 1895, the defendants were notified in writing that the drain was out of repair, and in the month of May, 1896, a formal notice was given to the defendants by the plaintiff Gordon, informing them that the drain was so much out of repair as to cause damage to the plaintiffs' crops, etc., and requiring the defendants to have the same cleaned out and otherwise repaired.

No action was taken by the defendants until the 2nd of October, 1896, when they, by resolution, directed the township engineer to examine the drain, report on the repairs necessary, and assess the amount to be paid by the various parties interested.

The engineer during the same month made his report to the council, in which he states: "I find that almost the whole of the said drain is very much out of repair, having become filled in from various causes in places to such an extent as to seriously detract from the usefulness thereof." And by the same report he estimated the cost of carrying out the repairs at \$1,325.34, and assessed the plaintiffs' land at the sum of \$90.00.

The defendants, on the 15th of December, 1896, passed a by-law authorizing the carrying out of the repairs recommended by the engineer, but did not commence work until September, 1897, after the commencement of this action, and the work was completed in November following.

During the night of the 26th of July, 1897, an exceptionally heavy rain began to fall, and continued for several days; some of the witnesses say three or four days, while others say from eight to ten days.

The plaintiffs' land was flooded and portions of their crops

Statement. destroyed, and other portions damaged by such flooding, and the plaintiffs claim that the injuries thus suffered were caused by the failure of the defendants to keep the drain in repair.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 23rd, 26th, and 27th of January, 1899.

George Lynch-Staunton, and *W. A. Logie*, for the appellants. The drain in question was undoubtedly allowed to remain out of repair, and the appellants are entitled at the least to compel the defendants to put it in repair, so that the dismissal of the action is wrong. The plaintiffs are also entitled to damages. It is admitted that water from the drain came on their lands and the defendants have failed to make out that the water would have come there if the drain had been in repair. The doctrine of *vis major* has, therefore, no application. *Noble v. City of Toronto* (1882), 46 U. C. R. 519, has been relied on, but in that case there was no negligence shewn. *McArthur v. Town of Collingwood* (1885), 9 O. R. 368, also relied on, is distinguishable for the same reason. The true rule is stated in *Nitro-Phosphate, etc., Co. v. London and St. Katharine Docks Co.* (1878), 9 Ch. D. 503.

Watson, Q.C., and *A. R. Wardell*, for the respondents. The appellants' case is not made out; their land was not in fact, damaged by water from the drain, or at all events if there was any overflow it was caused by the extraordinary rain-fall, and the respondents are not liable.

George Lynch-Staunton, in reply.

May 9th, 1899. The judgment of the Court was delivered by

LISTER, J.A. :—

I think the plaintiffs are entitled to judgment. The defendants having constructed the drain, the statute imposed on them the duty of maintaining, preserving and

keeping it in repair, and for failure to discharge the duty thus imposed, they became, under section 73 of the Municipal Drainage Act, liable to the plaintiffs in pecuniary damages, and also to a mandamus to compel them to repair and maintain the drain. The terms of the section are: "Any municipality neglecting or refusing to maintain any drainage work as aforesaid, upon reasonable notice in writing from any person or municipality interested therein and who or whose property is injuriously affected by the condition of the drainage work, shall be compellable by mandamus issued by the Referee or other Court of competent jurisdiction to maintain the work, unless the notice shall be set aside or the work required thereby varied as hereinafter provided, and shall also be liable in pecuniary damages to any person or municipality who or whose property is injuriously affected by reason of such neglect or refusal": see *Corporation of Raleigh v. Williams*, [1893] A. C., at p. 547.

Judgment.

LISTER,
J.A.

It may be observed that the plaintiffs do not complain of the drain as originally constructed, but rest the liability of the defendants upon their negligent failure to maintain and keep it in repair.

That the drain at the time of the injuries complained of was, and for a considerable time prior thereto had been, to the knowledge of the defendants greatly out of repair, is, upon the evidence, beyond controversy. It therefore follows that the defendants having failed to perform their statutory obligation were guilty of negligence, and are liable to the plaintiffs in this action for such damages as they may have sustained by reason of such negligence.

It was not contended by counsel for the defendants that they had discharged their statutory duty by keeping the drain in repair, but the contention was that the injuries complained of were occasioned by *vis major*.

Upon the authorities I think it clear that the defendants cannot exonerate themselves on the ground of *vis major* without clearly proving that the injuries complained of not only might, but must have happened, independently

Judgment.

LISTER,
J.A.

of their neglect. The principle as applicable to the present case is fully settled by the case of *Nitro-Phosphate, etc., Co. v. London and St. Katharine Docks Co.* (1878), 9 Ch. D. 503, affirmed in appeal, which, as set out in the head-note, was brought to recover damages occasioned by the neglect of the defendants to maintain a bank on their dock four feet high. At one point the bank was several inches below the level of four feet. An extraordinary high tide took place and the river rose to four feet five inches, in consequence of which the water overflowed the bank and damaged the property of a neighbouring proprietor. The tide had never been known to rise so high. It was held that the defendants were bound to keep their bank up to the level of four feet, and that they were liable to the plaintiffs for breach of their statutory duty in not doing so. It was also held that the extraordinary high tide, although an act of God, did not excuse the defendants from their liability, but that they ought to have an opportunity of shewing that the damage done by the act of God, and the damage done through their negligence, ought to be apportioned. "I hold, therefore," said Mr. Justice Fry, at p. 517, "that the statute imposed on the defendant company an obligation to maintain the upper surface of the bank which was to retain the water in their dock at a level of four feet above Trinity high water mark. It is conceded that they did not so maintain it. The result, in my opinion, is that there has been negligence on their part in not fulfilling their statutory obligation, and that they are responsible for that negligence." And further on he says: "I am clear that a defendant cannot avail himself of the act of God as an excuse when he has not done his own duty, except in cases in which he can make it apparent and plain to the Court that, if he had done his duty, damage would still have followed to the plaintiffs. Now that burthen the defendants have, in my opinion, not discharged in the present case." And again, he says: "The case, therefore, is one in which, in my opinion, negligence is brought home to the defendants, in which I cannot tell whether any portion

of the damage did or did not result from the act of God, in which the defendants have prevented me from telling what the effect of the act of God would have been if they had done their duty."

Judgment.

LISTER,
J.A.

The negligence of the defendants having been proved, they, under the defence which they have set up, were bound, as said by Mr. Justice Fry, "to make it apparent and plain to the Court that if they had done their duty damage would still have followed to the plaintiffs." I am of opinion, without particularizing the evidence, that it fails to establish the contention of the defendants. It may be that if the defendants had fulfilled their statutory duty, the plaintiffs would, notwithstanding, have suffered some injury, but I think, looking at the whole evidence, that the then condition of the drain was the substantial cause of the damage.

But apart from the question of damage caused from the overflow of water, the action upon the evidence was well brought for a mandamus, and if it be true that at the time of the trial the repairs had been completed, the plaintiffs were nevertheless entitled to judgment for nominal damages and their costs of suit.

The cases of *Noble v. City of Toronto* (1882), 46 U. C. R. 519, and *McArthur v. Town of Collingwood* (1885), 9 O. R. 368, do not, in my opinion, sustain the defendants' contention on the question of *vis major*. In neither case was negligence on the part of the defendants established, and a new trial was in each case ordered for the purpose of taking the opinion of the jury on the question of negligence.

In the present case the defendants' neglect to perform their statutory duty to keep the drain in repair has been proved.

The damages to which the plaintiffs are entitled cannot be estimated with any degree of accuracy. The cultivated portion of the land at the time of the injury comprised about twenty acres. The whole lot is low and forms part of what at one time was a swamp, and it is quite likely

Judgment.

LISTER,
J.A.

that in time of heavy rain, crops growing on it would be damaged to some extent irrespective of the condition of the drain. I think upon the whole evidence \$200 would be a fair and reasonable amount at which to assess the damages.

It follows that the appeal should be allowed, the judgment of the Referee reversed, and judgment entered for the plaintiffs for \$200 damages with costs of action, less their costs of the day on the adjournment on the motion to amend. The plaintiffs must pay the defendants their costs of the day on the same adjournment; all of such costs to be taxed on the County Court scale. The defendants must also pay the costs of this appeal.

Appeal allowed.

R. S. C.

COLQUHOUN V. MURRAY.

Limitation of Actions—Mortgage—Arrears of Interest—Acknowledgment.

Upon the sale of a property which was subject to mortgage the purchaser and the mortgagor inquired from the mortgagee the amount due, and the mortgagee signed a memo., endorsed upon the mortgage, fixing the amount claimed by him. The deed to the purchaser was made subject to the mortgage, upon which there was stated to be due the amount claimed, and contained a covenant by the purchaser to pay the amount and to indemnify the mortgagor, but the deed was not executed by the purchaser:—

Held, that the statement of the amount in the deed was not an acknowledgment of which the mortgagee could take the benefit, and that as against an encumbrancer claiming under the purchaser the mortgagee was entitled to only six years' arrears of interest.

Judgment of BOYD, C., reversed.

Statement.

THIS was an appeal by the defendant Doran from the judgment of BOYD, C.

The following statement of the facts is taken from the judgment of OSLER, J. A.:—

The action was commenced by writ issued on the 19th of August, 1896, by the plaintiff, as mortgagee under a mortgage dated the 7th of February, 1884, against the mortgagor,

one Hiram Bush, and the defendants J. G. Murray and his wife, as owners of the equity of redemption of the lands in question in virtue of a conveyance thereof from Bush to the defendant J. G. Murray, dated the 3rd of November, 1894. The statement of claim, delivered on the 19th of August, 1896, and amended on the 12th of March, 1897, under order of the 9th of March, 1897, alleged that there was then due on the mortgage, in respect of principal, \$1,407, the sum originally secured thereby, and \$1,821.25 for interest, and a personal order for payment was asked against the defendants Bush and Murray. Statement.

The provisions in the mortgage for payment were as follows:—

Provided this mortgage to be void on payment of \$1,407 * * with interest thereon at $7\frac{1}{2}$ per cent. per annum, as follows: The said principal sum of \$1,407 to be paid in four years from the date hereof, with interest at the rate aforesaid, to be payable annually, and if it is not so paid then it is to be compounded with yearly rests at the said rate of interest.

And it is hereby agreed that in case default shall be made in payment of any sum to become due for interest at any time appointed for payment thereof, as aforesaid, compound interest shall be payable, and the sum in arrear for interest from time to time shall bear interest at the same rate as the principal money secured by these presents, and in case the interest and compound interest are not paid in one year from the time of default a rest shall be made, and compound interest shall be payable on the aggregate amount then due, and so on from time to time, and all such interest and compound interest shall be a charge on the lands; but the said mortgagee shall, notwithstanding anything herein contained, be at liberty to foreclose this mortgage at any time on default of payment of principal or interest.

Murray, by his statement of defence, alleged that he was not in possession of the land, that the equity of redemption had been foreclosed, not saying by whom or

Statement. under what circumstances, and that there was no privity of contract between himself and the plaintiff creating any liability on his part to pay the mortgage debt or interest. His wife, the defendant Lydia Murray, defended on similar grounds and on the ground that she was not a proper party to the action.

Bush, the original mortgagor, defended on various grounds not necessary to be referred to, as the plaintiff, on the 12th of March, 1897, amended the statement of claim by discontinuing the action against him and claiming a sale of the land instead of a foreclosure. On the record as thus constituted and on the consent of the remaining defendants, the plaintiff obtained the usual judgment.

The conveyance from Bush to the defendant Murray of the 3rd of November, 1894, was for the expressed consideration of \$3,500. One of the covenants therein contained was that the party of the third part (Murray) "shall acquire possession of the said lands free of all encumbrances, except a mortgage to one William Colquhoun (the plaintiff), on which there was due \$2,877 on November 1st, 1894." Another provision contained therein was as follows: "The said grantee assumes the payment of the said \$2,877, paid said grantor \$100 cash down and giving him his note for \$523." The deed was executed by Hiram Bush and his wife, but not by the grantee Murray. It was duly registered on the 6th of November, 1894.

On the 24th of March, 1897, the plaintiff's claim was proved in the Master's office by affidavit at the sum of \$1,407 for principal, and for interest from the 7th of February, 1884, compounded to the 1st of November, 1894, \$1,470, and from thence to the 1st of April, 1897, at the rate of $6\frac{1}{2}$ per cent. on the whole sum due for principal and interest, \$467.63; in all \$3,344.63.

At a subsequent stage of the proceedings it appeared that on the 31st of January, 1895, the defendant Murray had conveyed the lands in question with other lands to one John Doran by way of mortgage to secure the repayment of the sum of \$600, and that Murray's equity of redemption

therein had by judgment and final order of foreclosure, dated respectively the 14th of July, 1896, and the 15th of January, 1897, been finally foreclosed in favour of Doran. Statement.

Upon this Doran was made a party defendant in the Master's office pursuant to Consolidated Rule (1888) 126. He contested the plaintiff's claim on the ground that he was entitled only to the principal due on the mortgage and six years' arrears of interest thereon, the acknowledgment contained in the deed from the plaintiff's mortgagor Bush to the defendant Murray not being effectual as against him under section 17 of the Limitations Act, R. S. O. (1887) ch. 111 (R. S. O. ch. 133, sec. 17), and such arrears not being otherwise charged upon the land in favour of the plaintiff. By the Master's first report, 19th of May, 1897, the balance due the plaintiff was found to be \$3,446.71, made up as follows : 1st November, 1894, balance due on Bush's mortgage, \$2,877 (the amount mentioned as part of the consideration in the deed from Bush to Murray); items of subsequent interest and costs, less an item of costs allowed to the defendant Murray, \$569.78; total, \$3,446.78. In the Master's reasons for his finding he says that he thinks the plaintiff is entitled, "at the least, to the \$2,877 which Murray had assumed and virtually agreed to pay" as part of his purchase money. This report was appealed from on several grounds, *inter alia* that the Master had erred in finding that the sum of \$2,877 was due to the plaintiff on the 1st of November, 1894, and also in allowing the plaintiff interest at a greater rate than six per cent. after the maturing of the mortgage, and more than the principal money and six years' arrears of interest thereon.

The report was referred back to the Master to take such further evidence as either party might be able to adduce within the scope of the reference, and to report thereon. The costs of the appeal were ordered to be paid by the plaintiff.

In his second report the Master adhered to his former ruling, and on the further evidence reported in effect that when Murray was about to buy the mortgaged property from Bush he wished to ascertain what was due upon the

Statement. plaintiff's mortgage, and that he and Bush and a solicitor went to the plaintiff's house, where the amount due was fixed upon between mortgagee and mortgagor at the sum of \$2,877, as of the 1st of November, 1894, and the interest reduced from the 3rd of November to the rate of $6\frac{1}{2}$ per cent. instead of $7\frac{1}{2}$ per cent. A memorandum to this effect was endorsed by the solicitor upon the mortgage, and signed by the plaintiff, but not by Bush. The deed from Bush to Murray was thereafter executed by Bush, containing the covenant and provision above set forth. Murray thereafter frequently promised to pay Colquhoun, and the latter forbore to press his claim under the mortgage until August, 1896.

An appeal by the defendant Doran from the second report, and a renewal of the appeal from the first report, were dismissed with costs by BOYD, C.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, and MOSS, JJ.A., on the 18th and 19th of May, 1898.

J. H. Moss, for the appellant.

D. W. Saunders, for the respondent.

January 24th, 1899. BURTON, C.J.O.:—

It would seem that on the sale by Bush to Murray the latter was advised to take the course which every prudent purchaser takes of satisfying himself by enquiry from the mortgagee as to the amount due upon his security. The mortgagee thereby estops himself from claiming more, but the purchaser does not bind himself to that amount, nor in the absence of express agreement become liable to the mortgagee for its payment, although as between himself and his vendor he was bound to indemnify him.

That is all that apparently occurred here, but in the deed from Bush to Murray he admits the correctness of the sum claimed on the mortgage as due on the 1st of November, 1894, but this does not satisfy the statute,

which requires the acknowledgment to be given to the person entitled to the arrears or his agent. This was not given or intended to be given to the plaintiff in any way, or was ever communicated to him, and I am of opinion that the statute ran, and that the account could only be taken against Doran on the footing of sec. 17 of R. S. O. (1887) ch. 111, and that the sum recoverable is the principal sum of \$1,407 with six years' arrears of interest at 6 per cent.

There may be room for some difference of opinion as to what, if anything, is recoverable under the special agreement as to compound interest and rests in case of any default occurring from time to time in the payment of interest, but as it was not argued I prefer to express no opinion about it at this time. The parties may, perhaps, agree upon the proper construction of that agreement.

The Chancellor has not given his reasons, although we are told that he did not adopt the reasoning of the learned Master, but assuming that there was an adjustment of the mortgage account, as suggested, that would not convert what had ceased to be a lien on the land into a charge in the absence of a writing.

The cases relied on by Mr. Saunders in the Irish Courts were acknowledgments in writing by the debtor, although they would seem to be regarded as having received a rather liberal construction, but are clearly distinguishable from the present case.

For these reasons, I think we must hold the statute applies, and there must be a reference back to take the accounts on this footing.

The appellant succeeds on the question on which he appealed, and should be allowed his costs.

OSLER, J.A. :—

I regret to be obliged to come to the conclusion that the judgment affirming the Master's report cannot be upheld as against the defendant Doran. The plaintiff

Judgment.

BURTON,
C.J.O.

Judgment.
OSLER,
J.A

stands in no better position against him than against the defendant Murray, as to whom, there being no privity of contract between them, he could not have enforced the arrangement with Bush by which Murray assumed as part of his purchase money the amount which the plaintiff, with the assent of Bush, though not by any agreement binding upon the latter, had declared to be due on the mortgage. As to both of them, the amount legally due on the mortgage, not exceeding \$2,877, was still open to be ascertained in a suit for foreclosure or redemption if either of them disputed it. If less were due on the 1st of November, 1894, than that sum, it merely meant that a larger sum remained due from Murray to Bush on account of purchase money, to none of which had the plaintiff any claim legal or equitable: *Canada Landed Co. v. Shaver* (1895), 22 A. R. 377, and cases there cited; *Manley v. London Loan Co.* (1896), 23 A. R. 139; *Campbell v. Morrison* (1897), 24 A. R. 224.

I do not think that more was done in this case by Murray when he bought from Bush than is done by every prudent purchaser from a mortgagor, namely, to ascertain from the mortgagee himself the amount of his claim under the mortgage. It is impossible to say that Murray dealt with the mortgagee in such a way as to take the debt upon himself and assume a direct liability to the latter therefor or to estop himself from asserting in a subsequent proceeding that less was due than the mortgagee claimed. Much less can it be said that anything was then done which had the effect of charging upon the land the amount then claimed by the mortgagee and converting the arrears of interest into principal. Whatever his claim was and to whatever extent it could be enforced, it rested upon his mortgage and upon that alone: *Sinclair v. Jackson* (1853), 17 Beav. 405.

Even, therefore, if the Statute of Limitations were out of the question, the mortgagee cannot recover more than the principal and interest at $7\frac{1}{2}$ per cent. up to the time it became due (7th February, 1888), and at the rate of $6\frac{1}{2}$

per cent. from that time. As I have said, he cannot point to anything by which the \$2,877 became, on the 1st of November, 1894, as between himself and the mortgagor, and subsequent owners of the equity of redemption, a charge *in solido* upon the land if it is not made so by the terms of the mortgage itself.

Judgment.

 OSLER,
J.A.

It has not been argued that the arrears of interest payable *quâ* interest during the currency of the mortgage lost that character and became converted into and chargeable as principal by virtue of being compounded so as to be taken out of the operation of section 17, and therefore the next question is what, upon the footing I have mentioned, the mortgagee is entitled to. The defendant, a subsequent incumbrancer, pleads this section of the Statute of Limitations, which enacts that no arrears of interest in respect of any sum of money charged upon or payable out of any land, or any damages in respect of such arrears of interest, shall be recovered by any action, but within six years next after the same have become due or next after any acknowledgment of the same in writing has been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent. This section, no doubt, applies in an action for foreclosure brought by a mortgagee against a purchaser of the equity of redemption, and in *McMicking v. Gibbons* (1897), 24 A. R. 586, it has been held also to apply conversely against him in an action by the latter for redemption. It is therefore incumbent upon the plaintiff to prove an acknowledgment such as the Act requires and made prior to the date of the defendant Doran's mortgage: *Bolding v. Lane* (1863), 1 DeG. J. & S. 122; Ashburner on Mortgages, p. 497; 2 Robbins's Law of Mortgages, p. 984, which will cover the whole of the arrears from the date of his own mortgage or the date of its maturity. Here the case fails, for the only acknowledgment proved and relied upon is not sufficient to prevent the operation of section 17. It is true that the requirements of that section have usually received a liberal construction, and probably in no cases more so than in the

Judgment.
OSLER,
J.A.

two Irish cases cited by Mr. Saunders: *Blair v. Nugent* (1846), 3 Jo. & Lat. 658, and *Millington v. Thompson* (1852), 3 Ir. Ch. 236. In the first of these an admission in the presence of one defendant of a debt in respect of a sum of money to which the plaintiff in the action and the other defendant were entitled in equal moieties, was held in a subsequent proceeding by the executor of the latter to be a sufficient acknowledgment, and in the other a direction by the debtor in his will to his judgment creditors, whom he appointed his executors, to pay themselves out of a certain fund should they accept the executorship was also held sufficient, though the creditors did not accept the executorship.

In this case the acknowledgment, so to describe it, contained in the deed from Bush, the mortgagor, to Murray, while in terms an admission of the existence of a demand on the part of the mortgagee large enough to embrace all arrears of interest which could then have accrued, is not made to the mortgagee or to his agent, but occurs in a transaction to which the mortgagee is not a party. Its only object was to shew how, as between the mortgagor and the purchaser, the purchase money was to be paid. It points to the latter and not to the former as the person who is to discharge the mortgage debt, and was not made with the view of shewing that the person making it was liable to the person to whom it was given, or of making him so liable. This is essential to the validity of such an acknowledgment as the statute refers to. Adopting the language of the Vice-Chancellor in *Batchelor v. Middleton* (1848), 6 Hare 75, 83, I may say: Why the mortgagor should not be allowed to make an admission in writing signed by himself of the mortgagee's claim to a third person of which the mortgagee may have the benefit I do not know, but the statute requires that the admission should be made to the mortgagee himself, and by that I am bound.

I refer to Brown on the Law of Limitation, pp. 658, 665; Darby and Bosanquet on Limitations, 2nd ed., pp.

221, 475 ; 2 Robbins's Law of Mortgages, p. 985 ; *Holland v. Clark* (1842), 1 Y. & C. C. C. 151 ; *Astbury v. Astbury* (1898), 78 L. T. N. S. 494 ; *Bolding v. Lane* (1863), 1 DeG. J. & S. 122 ; *Chinnery v. Evans* (1864), 11 H. L. C. 115 ; *Coope v. Cresswell* (1866), L. R. 2 Ch. 112. The appeal must, therefore, be allowed, and the mortgagee's claim limited to the principal and six years' interest accrued next before the commencement of the action, with subsequent interest and costs.

Judgment.

 OSLER,
 J.A.

MACLENNAN, J.A.:—

I think we are compelled by the terms of the statute, R. S. O. (1887) ch. 111, sec. 17, to allow this appeal. No acknowledgment could be more explicit of the amount due upon the plaintiff's mortgage than that made by the mortgagor Bush in the deed of sale made by him to Murray on the 3rd of November, 1894. But the statute requires that the acknowledgment shall have been given to the person entitled to the arrears or his agent. I think it cannot be said that this acknowledgment was given to the plaintiff or his agent in any sense, and therefore he cannot claim the benefit of it. There is no evidence that the deed signed by Bush was made for the benefit of the plaintiff, or at his request, or was ever communicated to him or to any one on his behalf. The cases of *Millington v. Thompson* (1852), 3 Ir. Ch. 236, and *Blair v. Nugent* (1846), 3 Jo. & Lat. 658, are quite distinguishable.

The further question which arises is what, having regard to the terms of the mortgage, are the arrears of interest which are barred by the statute, and made irrecoverable. The mortgage provides for compound interest at $7\frac{1}{2}$ per cent. with annual rests, and therefore the interest which became due at the end of each year after the first, was not merely interest on the original loan or debt, but interest on the accrued interest which had not been paid. The mortgage, however, makes no provision for interest on the principal money after maturity at the end of four years, and so

Judgment. after that date the higher rate of interest came to an end,
MACLENNAN, and no more interest was chargeable on the principal
J.A. money than six per cent. per annum: *St. John v. Rykert* (1884), 10 S. C. R. 278; *People's Loan and Deposit Co. v. Grant* (1890), 17 A. R. 85; (1890) 18 S. C. R. 262.

If, therefore, there had been no statute limiting the recovery of arrears, the account would be made up by computing compound interest at $7\frac{1}{2}$ per cent. per annum until the 7th of February, 1888, and then charging six per cent. simple interest. But the question would then arise on what sum the interest should be computed after maturity, whether upon the original sum of principal money only, or upon that and the compounded interest also. If the language of the deed was merely that the debtor was to pay compound, and not merely simple interest, it would be difficult to say that after maturity there should be interest on interest at all, for there would appear to be no more reason for allowing it in such a case than in the common case of an amount of simple interest being due at the maturity of the principal money. It is, however, competent to parties to stipulate for compound interest after maturity, in case of default in payment of the principal money, as well as before, and the question is what the agreement is in the present case. It is in the following terms:

[The learned Judge read the proviso and continued:]

Now, I find it impossible to confine this agreement to the period of four years allowed for the payment of the principal money. The last year's interest is payable at the end of the four years, and the agreement says that in case it is not paid in one year from the time of default a rest shall be made, and compound interest shall be payable on the aggregate amount then due, and so on from time to time, etc. I think that is clearly providing for compound interest after maturity of the principal money as well as before, and it is not confined to one year, but it is to go on 'from time to time,' which must mean until payment.

But the agreement for compounding after maturity seems not to be applicable to the principal money, and the result appears to be that while after maturity the principal money is only to bear simple interest at six per cent., the aggregate of compound interest due at maturity of the principal money shall continue to be compounded yearly at $7\frac{1}{2}$ per cent. until payment. I think that is the proper construction of the agreement, and the account should be stated in that way until the day to be appointed by the Court for payment. It should be stated exactly as it would be for the purpose of an action on the covenant for payment, or as it would be in the case of a sale under the power, in either of which cases there would be no limit to the recovery of arrears but the ten year limit. The account being so stated, all the interest which was due for more than six years should be deducted, and the balance will be the sum payable by the defendant.

Judgment.

 MACLENNAN,
 J.A.

The account can be easily made up by the parties without again going before the Master, and a new day for payment can be named in and by the order of this Court. There was no discussion on the argument before us of the clause relating to interest upon interest, and if the parties should desire to argue the point they ought to have an opportunity.

Moss, J. A. :—

In the course this action took before reaching the point of a judgment, it finally arrived at that stage in the form of an action against the defendants John G. Murray and Lydia Murray, merely seeking foreclosure of their equity of redemption and delivery by them of possession of the mortgaged premises.

The judgment referred it to the Master of the Court at Cornwall to take and make the usual accounts, proceedings, and enquiries, for redemption or foreclosure, and ordered the defendants to forthwith deliver possession of the mortgaged premises to the plaintiff.

Judgment.

Moss,
J.A.

It also ordered the defendants to pay to the plaintiff the amount found due to him for principal, interest and costs forthwith after the making of the Master's report, but this must have been done *per incuriam*, for no case for such relief was made by the pleadings.

In proceeding under this judgment the Master's duties were to enquire and state whether any person other than the plaintiff had any lien, charge or incumbrance upon the mortgaged premises, and to make such persons parties to the action and thereupon to proceed to take an account of what was due to the plaintiff and the other incumbrancers (if any) for principal money and interest, tax their costs, settle their priorities, and appoint a time and place, or times and places, for payment: Consolidated Rules 744 *et seq.*

The Master at Cornwall in prosecuting the reference under the judgment in this case found that the present appellant, John Doran, was an incumbrancer upon the mortgaged premises by virtue of a mortgage to him made by the defendants Murray for securing payment of the sum of \$600 and interest, and he thereupon caused him to be added as a party defendant in his office.

Doran had previously instituted proceedings against the Murrays for the foreclosure of his mortgage, and pending the proceedings in the Master's office under the judgment in this action, he appears to have obtained a final order of foreclosure against the Murrays, but these proceedings did not alter his position as a subsequent incumbrancer before the Master in this action.

In taking an account of the amount due the plaintiff the Master could only allow to him what was a charge upon the land, and Doran was entitled to redeem upon payment of the amount properly found to be due as a charge upon the land. And the enquiry before the Master therefore should have been what sum was properly chargeable against the land in respect of principal and interest under the plaintiff's mortgage. In other words, what was, as against Doran, the price of redemption: *McMicking v.*

Gibbons (1897), 24 A. R. 586; *Ashburner on Mortgages*, p. 295.

Judgment.

Moss,
J.A.

In the absence of agreement or an acknowledgment under the statute no more was chargeable against Doran than the principal money secured by the mortgage and six years' arrears of interest, accrued before the commencement of the action, together with subsequent interest from that date: R. S. O. (1887) ch. 111, sec. 17, now R. S. O. ch. 133, sec. 17.

Here there was no acknowledgment signed by the mortgagor, or Murray, or Doran, given to the plaintiff or his agent. At most, there was but a settlement of accounts between the plaintiff and his mortgagor Bush, which might or might not have bound the latter to pay the sum agreed upon in an action upon his covenant.

But there was no bargain or agreement between the plaintiff and Murray binding the latter to pay so as to entitle the former to enforce payment in his own right: *In re Errington*, [1894] 1 Q. B. 11; *Canada Landed Co. v. Shaver* (1895), 22 A. R. 377; *Fraser v. Fairbanks* (1894), 23 S. C. R. 79.

Bush, no doubt, was entitled to call upon Murray for indemnity, and if the plaintiff held an assignment of Bush's right Murray could, in a properly framed proceeding, be made liable to pay the plaintiff in performance of his obligation to indemnify.

But even that would not make the amount a charge upon the lands as against a subsequent incumbrancer.

There was no writing signed by Murray, and both the Statute of Frauds and the provisions of the Revised Statute already referred to are opposed to the creation of a charge by parol.

All interest beyond six years' arrears had ceased to be a charge upon the land on the 3rd of November, 1894, when the plaintiff signed the memorandum endorsed upon his mortgage by Mr. Dingwall, and there was no agreement then signed by the party to be charged that the whole amount mentioned in the memorandum should

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Moss,
J.A.

become principal and be a charge upon the lands and the Statute of Frauds applies: Ashburner on Mortgages, p. 23.

In Robbins's Law of Mortgages, vol. II., p. 1164, it is stated that "the conversion of interest into principal must appear by the manifest intention of the mortgagor; it is not sufficient that an account be stated between the parties. As a general proposition it may be laid down, that the agreement that interest shall become principal and carry interest must be declared by writing under the hands of the parties."

Under sec. 17 of R. S. O. (1887) ch. 111, the acknowledgment, to be effectual, must be given in writing to the person entitled or to his agent, and an acknowledgment given to a third person, such as might be sufficient under sec. 5 of the statute 3 & 4 Wm. IV. ch. 42, corresponding in effect to sec. 8 of R. S. O. ch. 72, will not be sufficient to keep alive a mortgagee's right to recover money charged on land for arrears of interest. That appears to have been the opinion of Alderson, B., as indicated in *Grenfell v. Girdlestone* (1837), 2 Y. & C. Ex. 662, at p. 676. And the difference between the two provisions is manifest from the sections themselves.

Section 8 of R. S. O. ch. 72, does not specify to whom the acknowledgment is to be given, while sec. 17 of R. S. O. (1887) ch. 111 [R. S. O. ch. 133], distinctly states that the acknowledgment is to be given to the person entitled thereto, or his agent.

And there was no such acknowledgment to the plaintiff in this case, nor in fact any acknowledgment signed by Murray, through whom Doran claims.

The Master appears to have been of the opinion that, because of the terms of purchase arranged between Bush and Murray, he could charge the lands in favour of the plaintiff with the amount stated in the conveyance from Bush to Murray to be due upon the plaintiff's mortgage.

But, as already mentioned, the plaintiff holds no assignment of Bush's rights, whatever they may be, against Murray, and no case was made for such relief upon the

pleadings, and it was not within the terms of the reference to the Master. Doran had been brought into the Master's office as an incumbrancer, and the only question between him and the plaintiff was the amount chargeable against the land upon the mortgage itself, and not what sums Murray might be personally liable for by reason of his agreement with Bush.

Judgment.

Moss,
J.A.

I think the plaintiff is entitled to a charge upon the lands as against Doran for no more than six years' arrears of interest next preceding the commencement of the action, and that the appeal should be allowed with costs.

The question as to the rate at which the arrears of interest are to be allowed, and whether or not the plaintiff is entitled to charge the rate reserved by the mortgage, after maturity of the principal, was not discussed, and if the matter is not to go back to the Master to ascertain and settle the amount due to the plaintiff, the parties should have an opportunity of being heard upon these points. Further, it should be open to Doran to urge that the agreement to capitalize the interest having formed part of the original transaction, is not valid or binding, and cannot be allowed to prevail against him: see *Chambers v. Goldwin* (1804), 9 Ves. 254, and *Mainland v. Upjohn* (1889), 41 Ch. D. 126, at 136, 137, and the remarks upon the present state of the law in 1 Robbins's Law of Mortgages, pp. 131-135.

The further questions as to interest were argued before the same Judges by the same counsel on the 17th of March, 1899, and on the 2nd of June, 1899, a supplemental judgment was given upon these questions. This judgment turns entirely on the peculiar wording of the proviso for payment and is not of general interest.

Appeal allowed.

R. S. C.

KIDD v. THOMSON.

Ship—General Average—Ice.

A liability to general average contribution arises only where both ship and cargo are in imminent and un contemplated peril and there is expenditure or sacrifice to secure their safety.

There is, therefore, no liability on the part of the cargo of a ship to general average contribution when, at a season of the year when such an occurrence is to be expected, ice forms in a harbour where a ship is lying in safety, and a tug is employed for the purpose of releasing her to enable her to complete her voyage.

Judgment of BOYD, C., reversed.

Statement. THIS was an appeal by the defendants from the judgment of BOYD, C.

The action was brought by the plaintiffs, owners of the schooner "Bavaria," against the defendants to recover (1) damages for the breach by the defendants of an alleged charter party or contract of affreightment, by the terms of which the defendants contracted to furnish the schooner with a full cargo of lumber to be carried from Marksville, St. Joseph's Island, to Windsor and Detroit; (2) contribution in general average; (3) demurrage; (4) freight on the cargo carried.

The defendants denied the making of the contract and also denied the right of the plaintiffs to recover in respect of the claims for contribution to general average expenditure and demurrage, and, while denying all liability in respect to the claim for freight, brought into Court the sum of \$324, being freight on the cargo actually carried.

The action was tried at Sandwich, and judgment was given for the plaintiffs for the \$324 paid into Court, \$220 for shortage in cargo, and \$145.68 as the defendants' contribution for general average expenditure. The expenditure in question was made to procure the services of a tug, by the aid of which the vessel was freed from ice which formed about her while she was lying in port taking on her load, and she was enabled to complete her voyage.

The claim for demurrage was abandoned. The amount paid into Court was sufficient to satisfy the claim for freight in respect of which it was paid in. Statement.

The appeal was argued before BURTON, C.J.O., MACLENNAN, MOSS, and LISTER, JJ.A., on the 28th and 29th of November, 1898.

W. R. Riddell, and *Glyn Osler*, for the appellants.

J. W. Hanna, for the respondents.

May 9th, 1899. The judgment of the Court was delivered by

LISTER, J.A. :—

Two questions arise. First, whether or not the defendants made the charter-party or contract of affreightment declared on, and for a breach of which the plaintiffs seek to recover damages in this action; and second, whether the expenses incurred by the plaintiffs in the circumstances of this case do or do not fall under the denomination of general average expenditure.

[The learned Judge then dealt with the claim for damages for breach of the charter-party, and held that on the evidence there was no foundation for it. He then continued:]

And now as to the second question: I think, with much respect to the learned Chancellor, that the evidence falls far short of making out a case which would entitle the plaintiffs to contribution from the defendants for general average expenses.

Mr. Carver, in the 2nd edition of his work on the Carriage of Goods by Sea, at p. 392, states the rule thus: "Whenever under extraordinary circumstances of danger to both ship and cargo, a voluntary sacrifice of money is made in order to save both ship and cargo, by the expenditure of which both ship and cargo are saved, the person

Judgment.
 LISTER,
 J.A.

who made the voluntary sacrifice is entitled to call upon the others whose property has been saved by the voluntary sacrifice made on their behalf, as well as his own, for general average contribution." See also *Ocean Steamship Co. v. Anderson* (1883), 13 Q. B. D. 651, at p. 662; *Kemp v. Halliday* (1866), L. R. 1 Q. B. 520.

Imminent peril must be impending over the whole adventure: *Ralli v. Troop* (1894), 157 U. S. 386, at p. 419.

And the expenditure must be made for the immediate safety of the adventure and for no other purpose: Arnould on Marine Insurance, 6th ed., p. 898; *Atwood v. Sellar* (1879), 4 Q. B. D. 342; *Svensden v. Wallace* (1884), 13 Q. B. D. 69; *Walthew v. Mavrojani* (1870), L. R. 5 Ex. 116; *Job v. Langton* (1856), 26 L. J. Q. B. 97; *The Mary* (1842), 1 Sprague 17; *The John Perkins* (1856), 3 Ware 89; *The James P. Donaldson* (1883), 19 Fed. Rep. 264, and (1884), 21 Fed. Rep. 671.

There can be no general average if the expenditure is made to avert a peril contemplated by the voyage, and thus within the scope of the shipowners' duty: *Taylor v. Curtis* (1816), 16 R. R. 686; *Covington v. Roberts* (1806), 9 R. R. 669; *Schuster v. Fletcher* (1878), 3 Q. B. D., at p. 425.

The onus is upon the plaintiffs to establish a loss which entitles them to demand contribution in general average from the defendants. They must shew that not only was the present safety of the adventure the result of the expenditure, but that to obtain it was the object and motive of the sacrifice.

Was imminent peril impending over the whole adventure? Upon the evidence I do not think so. The conduct of the master would indicate that he regarded the situation of the vessel as being one of safety. Ice began to form on the Tuesday after loading had commenced, and it continued to freeze up to, at all events, the Friday, when the telegram was sent by the master to the owners, and yet he made no effort to get out but continued the work of loading. Although the cargo was loaded on the Thursday he did

not telegraph to the owners until Friday, and it is to be observed that the telegram contains not the slightest intimation that the vessel's situation was one of peril or danger immediate or ultimate. On the contrary, it is, as it seems to me, the telegram of a master who expected to receive an order from the owners to lay the vessel up for the winter, and that such was the master's idea seems apparent from his evidence at the trial, a part of which was as follows: "When did you come to the conclusion that you would stay there all winter? I did not till I could hear from the owners. You were even arranging with a man to stay there with the boat all winter before you heard from Reilley? I was enquiring around."

The master did not determine that the expenditure was necessary for the safety of the adventure, nor did he authorize it to be made, but it was made by the owners without authority from the master and without any knowledge on their part as to whether the adventure was or was not in imminent peril. Reilley's evidence, from which I quote, makes this, I think, manifest. "Did you know it was dangerous when you telegraphed for the boat? No. You said in your examination you did not know there was any danger there? I knew there would be danger later on. * * Doesn't it stay in ice all winter wherever it is? The ice commences to shift in the spring." And before this he had said, "It was your suggestion, however, to send for the tug and have her brought down through the ice? Yes. And that is what you claim injured your boat? I done what I thought was right. If the boat had been left where it was instead of forcing it through the ice it would not have suffered the injuries it did sustain? That is the usual way of doing, we always try to protect a vessel and cargo by getting tugs."

The charter was made at a very advanced period in the season of upper lake navigation, and it is I think a reasonable inference that the owners, when making their contract or charter, contemplated the possibility, and even proba-

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bility, of encountering difficulties from early ice. Ice at that season of the year cannot be regarded as other than a common lake risk which it is the duty of the owners of a ship to overcome if at all possible.

The plaintiffs, under their contract, were bound to carry the cargo to its destination and there deliver it if possible. The vessel was delayed at the point of loading through ice, a misfortune, to be sure, for the owners, but one which they at that late season of the year might expect, and which they should have considered, and probably did consider, when making the charter. It was the duty of the plaintiffs to release the boat from the ice if it could be done, so that she might continue her voyage, and that it was possible is apparent from the fact that it was done. The observations of Cockburn, C. J., in *Schuster v. Fletcher* (1878), 3 Q. B. D. 418, are, it seems to me, peculiarly applicable to the present case. He said, at p. 425 :

"Here the shipowner had an interest in getting the ship off and bringing the cargo into port, in order that he might earn his freight. * * A great deal of what he has done was in the performance of his own contract. He was bound to use every effort to convey the cargo safely to its destination, and could only give up the task when it was hopeless. It cannot be said that the task was hopeless, when he was able at the cost of some trouble to bring it into port." See also *The Alcona* (1881), 9 Fed. Rep. 172.

In the view I take of the present case I do not think it necessary to discuss whether the expenditure can be regarded as having been made with the sanction or authority of the master, who, as such, was in charge of the whole adventure as agent of both ship and cargo owners, and whose duty it was to determine that the expenditure should be made for the safety of the adventure.

In my opinion the essentials necessary to constitute a claim for general average contribution in respect to expenditure are wholly wanting.

I think the appeal should be allowed, the judgment for the plaintiffs reversed, and the action dismissed, the

plaintiffs to be paid their costs of action up to and including statement of claim, and the defendants to be paid their costs of defence from and including instructions for statement of defence, and their costs of this appeal; and after deducting the defendants' costs as above from the money paid into Court, the balance to be paid out to the plaintiffs.

Judgment.

 LISTER,
 J.A.

Appeal allowed.

R. S. C.

WARD V. CITY OF TORONTO.

Landlord and Tenant—Covenant for Renewal or Payment for Improvements—Election.

Under a covenant in a lease that if, at the expiration of the term, the lessee should be desirous of taking a renewal lease, and should have given to the lessors thirty days' notice in writing of this desire, the lessors would renew or pay for improvements, the lessors have the right to elect and the lessee must accept a renewal unless before the expiration of the term the lessors elect not to renew.

Judgment of MEREDITH, C. J., 29 O. R. 729, affirmed.

THIS was an appeal by the plaintiff from the judgment of MEREDITH, C.J., reported 29 O. R. 729, and was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 22nd of March, 1899. The facts are stated in the report below and the line of argument is there indicated. The following cases were referred to in this Court: *City of London v. Mitford* (1807), 14 Ves. 41; *Nicholson v. Smith* (1882), 22 Ch. D. 640; *Moss v. Barton* (1886), L. R. 1 Eq. 474; *Buckland v. Papillon* (1866), L. R. 2 Ch. 67; *Hersey v. Giblett* (1854), 18 Beav. 174.

Statement.

Armour, Q.C., for the appellant.

Fullerton, Q.C., for the respondent.

Judgment. May 9th, 1899. MACLENNAN, J.A. :—

MACLENNAN,
J.A.

I think the action was properly dismissed, but on different grounds from those of the learned Chief Justice.

The defendants' contention is that if at the expiration of the term the lessee should be desirous of taking a new lease, having conformed to all the terms and conditions of that just expiring, and having given thirty days' notice of his desire, they would grant him a new lease at a ground rent to be fixed by arbitrators. Then there is a proviso that if the defendants did not think fit to grant a renewal the plaintiff should receive from them the value of his improvements, also to be fixed by arbitrators. Each party was to appoint an arbitrator, and those two were to appoint a third within two weeks, and the award was to be made within thirty days from the first appointment. If either party neglected to appoint an arbitrator, the County Judge was to appoint the other two. The value of improvements was to be paid in six months after the award, and until payment the lessee was entitled to possession on the terms of the expired lease.

Now, two things had to concur to entitle the plaintiff to a new lease. There had to be the thirty days' notice; and there had to be a conformity to all the terms and conditions of the expiring lease, and the time for these things was at the expiration of the term. Some of the terms and conditions which required conformity were the covenants to pay rent, and to pay taxes, and to repair, and to build an ornamental residence, and to leave the premises in good repair. There was a gale of rent to be paid on the very last day, and the plaintiff had to the very last moment of the term to conform to the other conditions. Under these circumstances I am unable to see how it can be held that the defendants were bound to elect whether they would grant a new lease, or pay for improvements, before the end of the term. Until the end of the term they could not tell whether the last gale would be paid, or whether the premises would be left in repair, failing which the

plaintiff had no right either to a new lease or to payment for improvements. I am, therefore, of opinion that the omission to elect before the end of the term, was not equivalent to an election to grant a new lease.

Judgment.
MACLENNAN,
J.A.

I agree with the learned Chief Justice that the defendants are not bound by the solicitor's notice of the 28th of September, 1895, saying that the committee had instructed him to say that the lease would not be renewed. The learned Chief Justice has shewn that the committee had no power to bind the corporation, and it is clear that, in order to be valid, an election not to grant a new lease had to be a corporate act.

The only corporate act done by the defendants was on the 29th of December, 1896, fifteen months after the expiration of the lease, when the council adopted a report to grant a new lease at a rent of \$230 per annum, or to be fixed by arbitration if not agreed to by the plaintiff; and this resolution was immediately communicated to him. The defendants never elected to pay for improvements.

There is no evidence that the plaintiff ever withdrew his notice requiring a new lease, or that he appointed an arbitrator; and I think the fair inference is that he is still in possession, although there is no express statement on the subject. I also think the fair inference is that at the expiration of the lease the plaintiff had conformed to all its terms and conditions, although the case is silent on that point also.

The situation then is this: The plaintiff gave the proper notice of his desire for a new lease, and fulfilled all the terms and conditions of the old one, and the defendants, after a silence of fifteen months, during which the plaintiff continued in possession, passed a resolution complying with his request. *Primâ facie* that completes a contract for a new lease. The plaintiff, however, says that if the defendants are not bound by the solicitor's notice, their silence and inaction for fifteen months must be taken as an election not to grant a new lease but to pay for improvements. I am unable to agree to this. I think if

Judgment. any inference is to be drawn from such silence and inaction, it is just the opposite inference. They covenanted to renew in certain events which occurred, but had an option to do something else instead. Unless they elected to pay the value of the improvements, they were bound to grant a new lease. They did not elect, and the consequence is they must perform their covenant. The defendants have chosen to say they will grant a renewal, and there is nothing to be done but to arbitrate if the plaintiff is not content to pay the rent named in the resolution. But I am inclined to think the defendants were entitled to have the rent ascertained, and also the value of the improvements, before making their election. They had reserved to themselves the right of judging which course would be most for their benefit, and they could make no prudent election until the rent, in the one case, and the value of the improvements in the other, was ascertained. I think the proper time for them to say whether they should think fit to grant the new lease, or not, was when all its terms were ascertained, including the rent to be reserved. The provisions of the old lease protected the plaintiff from any injury, for whether he got a new lease ultimately, or got paid for his improvements, he had a right to possession in the meantime, and could not be disturbed.

I think the appeal must be dismissed.

Moss, J. A. :—

The question submitted was whether the plaintiff was entitled to compel the defendants to pay him the value of his buildings and permanent improvements under the terms of the lease mentioned in the case, the plaintiff contending that the defendants did not see fit to renew the lease, or whether the plaintiff was bound to accept a renewal lease, the defendants being willing to make such renewal. Upon the argument before the learned Chief Justice, the plaintiff rested his contention upon two grounds, (1) that the defendants through a committee of the council had elected

not to renew the lease and the defendants thereupon became bound to pay the plaintiff the value of his buildings and permanent improvements, and (2) that, upon the terms of the lease, unless before the expiration of the term the defendants notified the plaintiff of their intention to grant him a renewal lease, they were to be deemed to have elected not to do so and that the plaintiff was entitled to consider that the defendants had not seen fit to renew the lease and to call upon them to pay him for his buildings and improvements.

The learned Chief Justice determined both grounds adversely to the plaintiff. Upon the appeal, the last ground only was much relied upon.

I think the Chief Justice came to a correct conclusion.

The property committee was not authorized to decide the course to be adopted with reference to the renewal of leases, but only to report the result of its deliberations and its recommendations to the council. The committee did not assume to decide anything, but referred the question to a sub-committee for consideration and report, through the committee, to the council. The sub-committee never reported the result of its deliberations to the committee or the council, and no action was had thereon by either the committee or the council.

There was nothing, therefore, to bind the defendants as upon an active election not to renew the lease.

The other question depends upon the construction to be placed upon the words of the lease.

It is apparent that the placing of improvements upon the leasehold premises by the lessee or his assignees was contemplated. And one object of the covenant for renewal was to encourage the lessee to make improvements and to protect him in so doing by enabling him to take measures whereby he would be secured of an extension of the term or in the alternative payment of the value of his improvements.

The matter was left in his hands. If he was willing to sacrifice his improvements he might do so by failing to

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Moss,
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J.A.

conform to the terms and conditions of the lease, or by not giving the thirty days' notice before the end of the term. In either of these cases there would be no renewal and the improvements would fall to the lessors.

But if the lessee desired to protect his improvements he was obliged to bind himself to a new lease for a further term at a rental to be agreed upon or fixed by arbitration.

By giving the notice he brings the covenant into effect, under which the lessors bind themselves to grant a new lease for twenty-one years upon the lessee having conformed to the terms of the old lease. But there is a proviso in ease of the lessors.

But for it the lessors would have no answer to the demand properly made for a new lease.

The office of the proviso is to qualify the operation of the covenant and to relieve the lessors from the obligation to perform it upon performance by them of certain other terms and conditions.

It points out with sufficient certainty what is required of the lessors if they wish to avail themselves of its provisions.

It provides that if they do not see fit (and this is substantially the same as saying if they do not desire or do not think proper) to give the renewal lease which by the covenant they have bound themselves to give, they must see to it that the lessee shall receive the value of his improvements or that proceedings for ascertaining the value be put in train.

They may put the matter in train in at least two ways, (1) by notifying the lessee of their intention not to give a new lease, in which case the lessee can proceed to appoint an arbitrator and carry on proceedings for obtaining an award; or (2) by themselves commencing arbitration proceedings and notifying the lessee thereof.

In the absence of some such action on the part of the lessors they fail to obtain the benefit of the proviso, and the lessee becomes absolutely entitled to the only thing which he has a right to demand by his notice—a new lease for a further term.

This is his right at the expiration of the first term unless it has been intercepted by action on the part of the lessors by which he is relegated to his alternative right.

Judgment.

Moss,
J.A.

As at present advised I am inclined to the view that the lessors are required to decide before the expiration of the thirty days from the receipt of the lessee's notice whether they will decline to grant a new lease, but it is not necessary to determine whether they are confined to that, or have until the last day of the term. At all events they are given ample time.

Upon the facts stated the plaintiff's notice perfected his right to a new lease. He was not called upon to do any further act by way of supplement to the notice as in *Brooke v. Garrod* (1857), 3 K. & J. 608, 2 DeG. & J. 62; and *Lord Ranelagh v. Melton* (1864), 2 Dr. & Sm. 278.

And the right was not displaced by any counter action on the part of the lessors.

I do not see how the mere inaction of the lessors is to be treated as an assertion on their part that they do not see fit to give a new lease. To my mind it is rather an indication that they accede to the terms of the notice and do not propose to avail themselves of the *locus penitentie*.

On the other hand, the plaintiff, having done all that was required of him in order to perfect his title to a new lease, was not called upon to take any further steps: *Hersey v. Giblett* (1854), 18 Beav. 174; *Nicholson v. Smith* (1882), 22 Ch. D. 640.

The appeal fails and should be dismissed.

OSLER, J.A.:—

I agree with the judgment of the learned Chief Justice in the Court below.

BURTON, C.J.O., and LISTER, J.J.A., concurred in the result.

Appeal dismissed.

R. S. C.

BIGGS V. FREEHOLD LOAN AND SAVINGS COMPANY.

*Mortgage—Sale—Account—Trust—Limitation of Actions—Interest—
Instalment—Acceleration Clause.*

When a sale is effected under a mortgage made pursuant to the Manitoba Short Forms of Mortgages Act, which, like the Ontario Short Forms of Mortgages Act, provides that the mortgagee shall be possessed of and interested in the moneys to arise from any sale upon trust to pay costs and charges and the principal and interest of the debt and upon further trust to pay the surplus, if any, to the mortgagor, the mortgagee becomes an express trustee of the proceeds of sale and the mortgagor is entitled to bring an action against him for an account notwithstanding the expiration of six years from the time of sale.

Section 32 of the Trustee Act, R. S. O. ch. 129, does not apply in such a case, because if there is a surplus it is trust money still retained by the trustee.

Judgment of FALCONBRIDGE, J., reversed.

A mortgage provided for payment of the whole principal money in two years from the date of the mortgage with interest in the meantime half-yearly at the rate of nine per cent. per annum; that on default of payment for two months of any portion of the money secured the whole of the instalments secured should become payable; and that on default of payment of any of the instalments secured at the times provided interest at the said rate should be paid on all sums so in arrear :—

Held, that the principal money was an instalment within the meaning of the proviso and that interest at the rate of nine per cent. per annum was chargeable upon it after the expiration of the two years.

Statement. APPEAL by the plaintiff from the judgment at the trial.

The following statement of the facts is taken from the judgment of MACLENNAN, J.A. :—

The plaintiff is mortgagor and the defendants are mortgagees, by virtue of four several mortgages, of land in Winnipeg. Three of the mortgages are upon the same property to secure three several advances, and the fourth is upon another property for another advance. The first mortgage was made on the 29th of December, 1882, to secure the sum of \$20,000 and interest half-yearly at 9 per cent. per annum, the principal money to be paid on the 2nd of January, 1885. The second mortgage was made on the 14th of June, 1886, to secure \$12,650 and interest at 8 per cent. half-yearly, principal money to be paid on the 14th of June, 1891. The third mortgage was made on the 14th of

January, 1887, to secure \$1,000, also with interest at 8 per cent. half-yearly and principal money payable on the same day as the last. The fourth mortgage was also for \$20,000, made on the 29th of April, 1884, with interest at $8\frac{1}{2}$ per cent. until May 1st, 1885, and afterwards half-yearly at 8 per cent., and principal payable on May 1st, 1889. The plaintiff made default in the payment of both principal and interest in 1885, after which default was continuous until the sale by the defendants, under the power contained in the mortgages, hereinafter mentioned in the year 1889. The defendants entered into possession of all the properties in the year 1887, and continued in possession until the time of the sale, and while in possession they spent considerable sums on repairs and improvements, with the consent of the plaintiff, and also in paying taxes and premiums of insurance. The sales made by the defendants were for the sums which they claimed to be due to them upon their several mortgages, and the validity of the sales is not questioned. The plaintiff brought the present action on the 17th of February, 1897, claiming an account in respect of the mortgages, and payment of a balance which he alleges will be found due to him upon an account being taken. He alleges that the defendants have made improper charges of interest in their accounts, and particularly that they have charged him with interest at the rate of nine per cent. instead of six per cent. after the maturity of the first mortgage. The defence is that by the express terms of the several mortgages the defendants were entitled to charge interest on the principal money, as well as upon arrears of interest, after maturity of the principal money as well as before, and they deny that there is any surplus in their hands; and they also plead that, the sales having been made more than six years before action, the plaintiff's claim is barred by the Statutes of Limitation. The mortgages were made in the Province of Manitoba, although the money is made payable at the defendants' office in Toronto; and they are all made in pursuance of the Manitoba Act relating to Short Forms of Mortgages, whereby

Statement.

Statement. it is declared that in case of sale the mortgagee is to be a trustee for the mortgagor of any surplus of purchase money.

The mortgage of the 29th of December, 1882, contains the following paragraphs relating to interest, and there is not anything else therein, or in the extended forms contained in the Act, which throws any light on the question :

1. The amount of principal money secured by this mortgage is twenty thousand dollars, and the rate of interest chargeable thereon is nine per cent. per annum, payable half-yearly, not in advance.

2. Provided this mortgage be void on payment at the office of the company in the city of Toronto of twenty thousand dollars, in gold coin if so demanded. The said principal sum of twenty thousand dollars to become due and be paid at the expiration of two years from the date hereof, that is to say, on the second of January, A.D. 1885, together with interest thereon in the meantime, at the rate aforesaid, half-yearly on the second days of July and January in each and every year, the first of such payments of interest to be made on the second day of July next, A.D. 1883, together with taxes and performance of statute labour.

3. Provided that on default of payment for two months of any portion of the money hereby secured the whole of the instalments hereby secured shall become payable.

4. Provided that on default of payment of any of the instalments hereby secured, or insurance, or any part thereof, at the times provided, interest at the rate above mentioned shall be paid on all sums so in arrear, and also on the interest by this proviso secured at the end of every half year that the same shall be unpaid.

5. And it is hereby agreed between the parties hereto that the company may pay any liens, taxes, rates, charges, moneys for insurance or encumbrances, upon the said lands, and the amount so paid, together with all costs between solicitor and client, charges and expenses, which may be incurred in taking, recovering and keeping possession of said lands, and generally in any other proceedings

taken to realize upon this security, shall be a charge on said lands in favour of the company, and shall be payable forthwith with interest at the rate of one per centum per month until paid, and in default the power of sale herein given by this indenture shall be exercisable, and in the event of any moneys being applied by the company to the payment of any charge or encumbrance on the said land, the company shall stand in the position, and be entitled to all the equities, of the person or persons to whom such money shall have been paid. Statement.

By a subsequent clause the mortgagees were given power to distrain "for arrears of interest and for instalments."

Before action the plaintiff assigned his claim to the Imperial Bank of Canada by way of collateral security.

The action was tried at Toronto on the 22nd of April, 1898, before FALCONBRIDGE, J., who held that the Statutes of Limitation were a bar.

The appeal was argued before BURTON, C. J. O., MACLENNAN, MOSS, and LISTER, JJ. A., on the 1st of December, 1898.

James Bicknell, for the appellant. Under the Manitoba Short Forms of Mortgages Act, which is in this respect the same as the Ontario Short Forms of Mortgages Act, the mortgagee is declared to be, in the event of a sale by him of the mortgaged property, a trustee of the purchase money upon the trusts set out in the Act, the ultimate trust being in favour of the mortgagor. That being so, *In re Bell, Lake v. Bell* (1886), 34 Ch. D. 462, is a direct authority, if authority be needed, that the Statutes of Limitation are not a bar. And see *In re Harwood* (1887), 35 Ch. D. 470. The cases of *Locking v. Parker* (1872), L. R. 8 Ch. 30; *In re Alison, Johnson v. Mounsey* (1879), 11 Ch. D. 284; and *Banner v. Berridge* (1881), 18 Ch. D. 254; have been relied on in the Court below in support of the

Argument. contrary view, but these cases are distinguishable. *Locking v. Parker*, went off on technical grounds; in *In re Alison*, the mortgagor's rights were extinguished before the sale; and in *Banner v. Berridge*, there was no trust. The Trustee Act is no defence because the surplus is retained in the trustees' hands. The defendants have rendered statements to the plaintiff within six years, and these are acknowledgments if the Act is held to apply. The plaintiff is, therefore, entitled to an account, and in taking that account interest should be allowed after maturity at the rate of six per centum per annum only: *People's Loan and Deposit Co. v. Grant* (1890), 18 S. C. R. 262.

Armour, Q.C., for the respondents. The plaintiff having assigned his claim has no right to sue, and to a stale claim of this kind this technical objection should be given effect to. On the merits, too, he must fail. It is a fallacy to say that there is an express trust. If it is shewn that there is a surplus then a constructive trust arises, but after the expiration of six years from the sale it is too late to attempt to shew that there is a surplus. In each of the cases cited on behalf of the appellant there was admittedly a surplus. At any rate the Trustee Act applies. Assuming that no question of trust were involved, there would, of course, be no right of action after six years, and the effect of the Act is that even with a trust the same result arises. The case is not within any of the exceptions; there has been no fraud or concealment, and no retention of specific property or money: *Thorne v. Heard*, [1893] 3 Ch. 530; [1894] 1 Ch. 599; [1895] A. C. 495; *How v. Earl Winton*, [1896] 2 Ch., at p. 638. There has been no acknowledgment. An account has been given, but it shews no balance and contains no promise. If, however, an account is to be taken the defendants are entitled to interest at the mortgage rate. The mortgages are peculiarly worded, and evidently "instalment" in the proviso for payment is meant to include the principal. The long form of the power of sale given in the Manitoba Act authorizes the retention of interest to the time of sale at the rate

reserved. The Ontario Act is the same in this respect, and this point does not seem to have been called to the attention of the Court in *People's Loan and Deposit Co. v. Grant* (1890), 18 S. C. R. 262. Argument

Bicknell, in reply.

May 9th, 1899. MACLENNAN, J. A.:—

It was contended before my learned brother Falconbridge, who tried the action, that the land having been sold, and the validity of the sales not being questioned, it was not a redemption action, but merely an action for the recovery of a sum of money, an ordinary action of debt, to which the six years' bar would apply. On the other hand, it was answered that by the very terms of the mortgage deeds the defendants were express trustees of the surplus, if any, which was in their hands, and that the statute was inapplicable.

My learned brother gave effect to the defendants' objection and dismissed the action. He held that the trust was not express, but constructive, and that the six years' bar was applicable. In so deciding he relied upon *Banner v. Berridge* (1881), 18 Ch. D. 254; *Locking v. Parker* (1872), L. R. 8 Ch. 30; and *In re Alison, Johnson v. Mounsey* (1879), 11 Ch. D. 284.

Banner v. Berridge, was the case of a mortgage of a ship, in which there was no express trust of the surplus upon a sale: see the judgment of Kay, J., pp. 259, 260, and it was held that after six years evidence could not be adduced to prove a surplus. But the learned Judge distinctly recognized that when the mortgage deed declares that the mortgagee shall hold the surplus in trust for the mortgagor it is a case of express trust. In *In re Alison*, after a mortgagee had gained title by possession, his devisees, who were directed to sell his lands for the purposes of the estate, did sell, and carried out the sale as under the power in the mortgage. Malins, V.-C., held that because there was in the mortgage an express trust of the surplus the

Judgment. mortgagor was entitled to an account of the surplus. His
MACLENNAN, judgment was reversed by the Court of Appeal, on the
J.A. ground that the executors could not destroy the title which
their testator had acquired by possession. But both the
Master of the Rolls and the Lords Justices distinctly recog-
nized that where by the deed the mortgagee is expressly
made a trustee of the surplus for the mortgagor, that is an
express trust within the Statute of Limitations. The same
thing was held by Chitty, J., in *In re Bell, Lake v. Bell*
(1886), 34 Ch. D. 462, where the solicitor of a mortgagee
was held liable to the latter for surplus money received by
him more than thirteen years before, and the judgment
was rested on the ground that the mortgagee was himself
an express trustee by the terms of the power of sale, and
was liable as such to the representative of the mortgagor.

I think my learned brother has misapprehended the
effect of these decisions, and that they shew that under
these mortgages the defendants became and are express
trustees of the surplus proceeds of sale. Indeed, to my
mind, it required no authority to establish that proposi-
tion, for one definition of an express trust is a trust
declared in writing. It follows that the Statute of Limi-
tations is inapplicable to the case. The limitation clauses
of the Trustee Act were also relied on, now R. S. O.
ch. 129, sec. 32. But, in my opinion, it is clear that this
section is also inapplicable, because if there is a surplus it
is trust money still in the defendants' hands, and still
retained by them, a case which is excepted from the opera-
tion of the section.

The Statutes of Limitation being out of the way, the
plaintiff's right to an account is clear. The defendants
as mortgagees in possession at the time of the sale were,
and are, clearly persons liable to account to the plaintiff.
The liability of a mortgagee under such circumstances is
a matter of course, and the account will be directed, without
any special case being made for the purpose, to extend not
only to what he has received, but also to what, without
wilful default, he might have received. If there was a

surplus at the time of the sale the defendants became trustees of it for the plaintiff; and whether there was a surplus or not can only be ascertained by taking the accounts. I am of opinion, therefore, that the appeal should be allowed and that judgment should be for the plaintiff in the usual form for an account, reserving further directions and costs of the action.

Judgment.
MACLENNAN,
J.A.

It was contended by the defendants, and, as the point was fully argued before us, it will be for the convenience of the parties that we should express our opinion upon it now, that the several mortgages provided expressly for interest both before and after the maturity of the principal money. The question seems not to be important, except as to the first mortgage, namely, that of the 29th of December, 1882, the sale having taken place before the maturity of any of them, except No. 4, made on the 29th of April, 1884, which matured on the 1st of May, 1889.

The mortgage is a printed form with blanks filled up in writing, with the names of the parties, and a description of the land, and all the paragraphs above set out are wholly printed. The contention of the defendants is that the word "instalments" means, or at all events includes, principal money; while the plaintiff contends that it is either wholly insensible, or if not, that it can only refer to the sums to be paid for interest. After much consideration I have come to the conclusion that the defendants' contention ought to prevail. I have numbered the paragraphs for convenience of reference. By paragraphs 1 and 2 there are five separate payments provided for, namely, the principal money and four half-yearly payments of interest, the principal money and the last payment of interest to be paid on the same day. Taxes are also to be paid, for which no day is named.

Then comes paragraph 3, whereby on default of payment of any portion of the money hereby secured the whole of the instalments hereby secured shall become payable. The meaning of the first part of this paragraph is plain enough. A default in paying the first or second or third gale of

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MACLENNAN,
J.A.

interest, or of taxes, would clearly be within the language. Then suppose a default in payment of the first half year's interest, on the day, and two months to elapse, without payment, what is to happen? It is that the whole of the instalments hereby secured shall become payable. The question then is, what are the instalments hereby secured? If we say it merely means the other three payments of interest, and that these are to be accelerated and made payable in advance, it seems impossible to exclude the principal money, for it is as much a sum "hereby secured" as the gales of interest, and it is made as comprehensive as possible by the use of the word "whole." "Instalment," no doubt, primarily signifies a part of a larger sum. But I think it is here used in the sense of "payment," and was intended to mean every sum which by the deed the mortgagor was to pay, every sum hereby secured, and to include liens, taxes, rates, charges, insurances and incumbrances mentioned in paragraph 5. It is as if it said the whole of the payments, or the whole of the money, hereby secured, shall become payable. It would not be incorrect to say that the principal money of a mortgage was all payable in one instalment. That would plainly mean in one sum or in one payment, and not in several. I therefore think that the word "instalment," in paragraph 3 at all events, includes the principal money. Paragraph 4, however, is the one on which the question to be determined depends. If I am right in the conclusion that "instalments" includes the principal money in paragraph 3, there is no difficulty in holding that it does so in paragraph 4, for the words used are the same: "instalments hereby secured," and it provides for interest at the same rate after maturity. The conclusion to which I have arrived seems to me to be strengthened by the provision in paragraph 5, which authorizes the company to pay liens, taxes, rates, etc., upon the land, to be repaid by the mortgagor forthwith with interest at the rate of one per cent. per month until paid, and also by a subsequent proviso, also printed, authorizing the mortgagees "to distrain for arrears of interest and for instalments."

In my judgment, therefore, the appeal should be allowed, and the plaintiff should have the usual judgment for an account, with a declaration that the defendants are entitled to interest at nine per cent. on the principal money after maturity as well as before, but not compounded, and also interest upon the other matters specified in paragraph 5 at the rate of one per cent. per month. Subsequent costs, and the costs of the action, to be reserved.

Judgment.
MAULENNAN,
J.A.

Moss, J. A.:—

The parties concede that the provisions of the 2nd schedule to the Short Forms of Indenture Act of Manitoba (Con. Stat. 1880 ch. 61), apply to the mortgages in question herein, and to the sales made under the powers of sale contained in them.

Both parties treat the sales as having been made to Leckie at nearly the same date, viz., the Terrace property on or about the 20th of June, 1889, and the Biggs' Block property on or about the 31st of July, 1889, although the recitals in the conveyance of some portions of the former property to one Tollemache, speak of the attempted sale of it in 1889 as having proved abortive. However, the parties are satisfied to treat both properties as having been sold to Leckie, and the case has been dealt with on that footing in the Court below as well as in the argument in this Court.

The defendants' contention, in which they succeeded at the trial, was that as to any surplus of the proceeds of the sales they were merely constructive trustees, and that an action to enforce such a trust and recover a surplus must be brought within six years from the sale. They also contended that they were entitled to the benefit of section 32 of the Trustee Act, and that they were not within any of the exceptions so as to prevent them from setting up the Statutes of Limitations as a bar, but this question was not dealt with by the trial Judge.

The plaintiff says the defendants are express trustees of

Judgment.

Moss,
J.A.

the surplus proceeds of the sales, and that they are not entitled to the protection of section 32 of the Trustee Act.

In the 13th extended clause of the 2nd schedule to the Manitoba Act there is contained a declaration that the mortgagee, his heirs, etc., shall hold the moneys to arise from any sale upon trust to pay expenses, and in the next place to pay and satisfy the principal and interest secured, and after payment and satisfaction of all such sums upon the further trust that the mortgagee, his heirs, etc., do and shall pay the surplus, if any, to the mortgagor, etc.

Applying this clause to the mortgages in question they are found to contain one species of express trust, *i.e.*, a trust clearly created and declared by a written instrument.

The authorities establish that to such a trust the six years' bar does not apply, and but for the argument to the contrary, I should have thought it clear that unless the defendants could shew themselves entitled to the benefit of section 32 of the Trustee Act the plaintiff was entitled to an account of the application of the proceeds of the sales of the mortgaged properties.

In the case *In re Bell, Lake v. Bell* (1886), 34 Ch. D. 462, the mortgage deed contained the usual power of sale in case of default in payment, and provided that the surplus, if any, of the moneys arising from the sale should be paid to the mortgagor, his heirs or assigns. Chitty, J., said (p. 464): "There was in the mortgage deed an express trust as to the surplus moneys arising from the sale. The surplus moneys were therefore a trust fund and Willoughby [the mortgagee] was a trustee for the mortgagor."

In *Thorne v. Heard*, [1893] 3 Ch. 530, the main question discussed was the right of the defendants to the protection of the Trustee Act, 1888, but their position under the mortgage deed had to be considered.

The mortgage contained a declaration with regard to the disposition of the moneys arising from a sale under the power not greatly differing in terms from that contained in the mortgages herein.

When the case was before Romer, J., for trial, it appears

to have been taken for granted that the mortgagees were express trustees of the surplus, and that unless they were entitled to the benefit of the Trustee Act they were liable to account to the plaintiff, though fourteen years had elapsed since the sale under the power.

Judgment.

 Moss,
J.A.

In the Court of Appeal, [1894] 1 Ch. 599, each of the Lords Justices expressed the opinion that the liability of the mortgagees was clear unless they were protected by section 8 of the Trustee Act, Kay, L.J., saying (p. 607): "Undoubtedly the first mortgagees became trustees of the surplus proceeds. * * They have not paid the plaintiff any part of it and *prima facie* they are liable. But they claim the benefit of the Statute of Limitations contained in section 8 of the Trustee Act (1888)."

The case went to the House of Lords, and there, [1895] A. C. 495, none of the law lords questioned the view thus expressed.

No doubt, in the absence of an express trust declared with regard to the proceeds of the sales, it would be incumbent on the plaintiff to shew the existence of a surplus and thereby raise a constructive trust as to it, and any action for that purpose would have to be brought within six years from the receipt of the proceeds.

But that is just the difference between the two cases, as is clearly shewn by the authorities upon which the defendants rely, viz., *Locking v. Parker* (1872), L. R. 8 Ch. 30; *In re Alison, Johnson v. Mounsey* (1879), 11 Ch. D. 284, and *Banner v. Berridge* (1881), 18 Ch. D. 254.

These cases, when examined, appear to turn upon their own special circumstances. They were decided in the way they were either because there never was an express trust, or because, although there was originally an express trust, the rights springing out of it had ceased to be enforceable by reason of some after occurring circumstances.

In *Locking v. Parker*, the Lords Justices were of opinion that the instrument in question created an express trust of the surplus money for the mortgagor. But because the bill was framed upon the theory of the instrument not

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Moss,
J.A.

being a mortgage but a trust deed and prayed for the execution of the trusts, they would not give relief upon the footing of its being a mortgage. Lord Justice James said (p. 40): "If, then, there had been *any allegation in this bill*, or any evidence, that there were any surplus moneys, the bill might have been sustained for those surplus moneys. But that is not the frame and intention of the bill."

According to this language it can scarcely be doubted that if the Lords Justices had the pleadings and the mortgages in the present case before them they would have decreed an account.

So in *In re Alison*, the instrument was one under which the mortgagee would have been an express trustee of the surplus for the mortgagor if a sale of the mortgaged premises had been made under the power before the mortgagor's rights had been barred under the Real Property Limitations Act by more than twenty years' possession by the mortgagee.

But the mortgagee had been more than twenty years in possession without any recognition of the title of the mortgagor, and it was held that a sale made after his death by his executors and trustees, even though purporting to be made under the power of sale, did not give the mortgagor any right to the surplus. And referring to *Locking v. Parker*, Baggallay, L.J., said (p. 298): "In that case had there been any surplus moneys after satisfying the principal money and interest due, the mortgagees would doubtless have had to account, because the trust had arisen before the estate was barred, but the distinction between that case and the present is this, that in the present case the sale did not take place until after the estate had been barred." I do not think the Lord Justice in saying this was intending to dissent from Lord Justice James' statement in *Locking v. Parker*, that had there been any allegation in the bill, * * that there was any surplus the mortgagees would have had to account.

Banner v. Berridge was the case of mortgage of a ship,

under the Merchants' Shipping Act, 1854, and it was held that under the provisions of that Act there was no express trust of the purchase money:

Judgment.

Moss,
J.A.

But Kay, J., points out the distinction in the case of a mortgage of realty. He says (p. 260): "In the ordinary case of a power of sale in a mortgage, the power of sale expresses that the mortgagee, when he receives the mortgage [*purchase*] money, shall hold it upon trust to defray expenses, then to pay himself what is due upon his mortgage, and lastly, to pay the surplus to the mortgagor." And after reviewing some of the authorities, including *Locking v. Parker*, he says (p. 269), referring to the position of the defendants in the case before him: "If these persons are trustees, then at any time at least within twenty years, at any time within that which according to the ordinary rules of equity a presumption of payment would arise, the mortgagor or the second mortgagee might file a bill against the first mortgagee, *alleging that he had sold, and that there was a surplus*, and require him to account, and that, although there had been no acknowledgment of the existence of any surplus, or of the mortgagee's [*mortgagor's*] right to sue in any shape or way within those twenty years after the sale." We have here a clear statement of the position in the case of an express trust. He then proceeds to deal with the application of these decisions to the particular case then before him, and continues: "But I take the true result of these decisions to be this, that in this particular case, where there was no trust expressed either in writing or verbally of the proceeds of the sale, no trust can possibly arise until it is shewn that there is a surplus, and then I should be disposed to hold that there is sufficient fiduciary relation between the mortgagor and mortgagee to make the mortgagee constructively a trustee of the surplus, in case it is shewn there is a surplus. But that seems to me to be a case not of express trust at all but of constructive trust, that is to say, a case of a trust which only arises on proof of the fact that there was a

Judgment. surplus in the hands of the mortgagee after paying himself.”
Moss,
J.A.

He is there pointing out what must occur—there being no express trust—in order to give rise to a constructive trust. He then proceeds (p. 269): “And, if that be so, the ordinary rule of a Court of Equity would apply, that nobody would be allowed to enter into evidence to raise a case of constructive trust after the statutory period had expired; that is to say, in this case, after six years had expired from the time when the money was received by the mortgagee, without acknowledgment of the mortgagor’s title or of there being any surplus, a Court of Equity would not, according to its ordinary rule, allow parties to enter into evidence for the purpose of shewing that there was a surplus in order to raise the case of constructive trust.”

That is, there being no express trust, a case of constructive trust may be raised by shewing the existence of a surplus, but an action for that purpose must be brought within six years of the receipt of the purchase moneys.

In the present case there is an express trust declared, and there is the allegation that the defendants have in their hands a large sum belonging to the mortgagor, and a claim for an account and payment of the balance found upon the taking of the account.

The next question is, whether the defendants are entitled to the benefit of section 32 of the Trustee Act.

They admit having received the proceeds of the sales of the mortgaged premises. They do not pretend to have dealt with them otherwise than in payment of the expenses and in satisfaction of their claim under the mortgages. They have not paid over any portion of them to the plaintiff, and the chief question on taking the accounts will be whether they have retained more than sufficient to satisfy their claim. If they have, then the surplus is trust moneys still retained in the trustees’ hands, and the case is excepted from section 32 of the Act.

The plaintiff being entitled to an account, the question

of interest might be left to be dealt with by the Master upon taking the account. But the point was fully argued, and the parties seemed to desire our opinion upon it.

Judgment.

Moss,
J.A.

If the word "instalments," used in the proviso for accelerating payment in case of default, and in the succeeding one with regard to interest on arrears, is to be read as applying to the principal money, I think there is in these mortgages a covenant or agreement to continue the payment of interest at the rate stipulated for in them beyond the day fixed for repayment of the principal.

The word "instalments" was evidently inserted in the form of the mortgages with reference to the method formerly in use by building societies of capitalizing the sum advanced and the interest to accrue during the period of the security, and dividing the total sum into instalments, and there is, therefore, some difficulty in applying it to the payments under the mortgages.

But, on the whole, I have come to the conclusion that it may be read as referring to the payment of the principal moneys.

That it may be fairly so read in the proviso for accelerating the payments is made more apparent by a reference to the corresponding extended clause in the 2nd schedule of the Act, and incorporating therein the words used in the mortgages. The language of that clause, particularly the latter part, covers all the moneys secured by the mortgages or mentioned or intended so to be. See *In re The Middleborough Building Society* (1884), 54 L. J. Ch. 592.

Then, if the word is to be so read in the earlier paragraph it should be read in the same sense in the succeeding paragraphs, unless there is something in the context calling for a different construction.

There is no such context, and it is plain that the word was used in the same sense in both provisos. I think, therefore, that the defendants are entitled to be allowed interest at the rates stipulated for in the mortgages until the dates of the sales, when, according to their own admis-

Judgment.

Moss,
J.A.

sion, the whole of the principal and interest was satisfied, and the accounting should proceed upon that footing.

The plaintiff is entitled to judgment for an account upon the footing of the sales, reserving further directions and the costs of the action.

The plaintiff's right to sue in his own name was not questioned upon the pleadings, nor until on his examination at the trial it appeared that he had made an assignment of his claim by way of security to the Imperial Bank. Such an assignment does not absolutely deprive the plaintiff of the right to sue, but it may be proper to now add the bank in order to bind it by the result of the accounts.

BURTON, C.J.O., and LISTER, J.A., concurred.

Appeal allowed.

R. S. C.

REGINA V. CUSHING.

Court of Appeal—Jurisdiction—Criminal Law—Order Quashing Conviction.

No appeal lies to the Court of Appeal for Ontario from an order of a Divisional Court quashing a conviction by a police magistrate for breach of a municipal by-law.

Statement.

APPEAL by the private prosecutor from the judgment of a Divisional Court, quashing a conviction by the police magistrate of the city of Hamilton for breach of a by-law of that municipality regulating the sale of meat.

A motion to quash the appeal on the ground of want of jurisdiction and a motion for leave to appeal if leave was deemed necessary were enlarged from Chambers into Court.

The appeal and motions came on to be heard before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 11th of May, 1899.

Mackelcan, Q.C., for the appellant.

Statement.

W. Nesbitt, and *J. G. Gauld*, for the respondent.

The objection that the Court had no jurisdiction to entertain the appeal was first heard, and after argument this objection was given effect to and the appeal was quashed.

Subsequently the following reasons for judgment were given on behalf of the Court by

OSLER, J. A.:—

For many years before the Judicature Act of 1881, 44 Vict. ch. 5 (O.), the Court of Appeal was a Court of Record with appellate jurisdiction in civil and criminal cases, and an appeal lay thereto from every judgment of the Superior Courts in certain specified cases, but in no others, unless the judgment appeared of record: C. S. U. C. ch. 13; R. S. O. (1877) ch. 38. No appeal lay thereto from the judgment of either of the Superior Courts of law quashing a conviction. This was decided in the case of *Regina v. Eli* (1886), 13 A. R. 526, the first occasion on which, so far as I know, such an appeal was ever attempted to be brought. By the Judicature Act, passed on the 4th of March, 1881, the Court of Appeal as then existing was continued under that name: section 4; and was declared to be a Superior Court of Record with all the power and jurisdiction which it theretofore had, save as varied by the Act: section 13; and see R. S. O. ch. 51, sec. 49, and in civil cases had also jurisdiction and power to hear and determine appeals from any judgment or order of the High Court, or any Judge thereof, save as excepted. These words, "or order," were an extension of the jurisdiction which the Court formerly possessed as regards the right of appeal from orders made by the Superior Courts of law: *Hately v. Merchants Despatch Co.* (1886), 12 A. R. 640.

Although much that is said in the case of *Regina v. Eli*, above cited, is adverse to the appellant's contention,

Judgment.

OSLER,
J. A.

yet it is not entirely decisive of the case before us, because the conviction there was made under the authority of an Act of Parliament, the Canada Temperance Act, and the question related to criminal law and procedure strictly. Here the conviction is made under a by-law passed under the authority of a local Act, and the Legislature could, had it thought proper to do so, have given an appeal to this Court.

The appellant contends that the appeal lies under the general language of the Judicature Act, the judgment by which the conviction was quashed being a judgment or order of the High Court. The question is whether the proceeding in the High Court was a "civil case" within the meaning of the 49th section of the Act. It may be conceded that it was not a matter relating to criminal law or procedure within section 91 (27) of the British North America Act, but I do not think it necessarily follows from this that it falls within the scope of the Judicature Act, or is subject to the procedure which that Act provides in relation to ordinary causes, actions, and matters *inter partes*.

The summary procedure before justices under Acts of the Provincial Legislature is by law similar to that under Dominion legislation.

Special provision is made with regard to appeals to the General Sessions, etc., from summary convictions under Provincial Acts, and the practice and procedure thereon: R. S. O. ch. 90.

The jurisdiction of the High Court to review such convictions when brought before it on *certiorari*, to the same extent and in the same manner as summary convictions under a Dominion Act, seems not to be interfered with: Judicature Act, sec. 25.

The practice in that respect followed in the High Court as to both classes of convictions is substantially the same.

The procedure in matters of this kind appears, therefore, to be special and independent of the provisions of the Judicature Act.

And although summary proceedings for infractions of the laws of the Provincial Legislature, or by-laws passed under their authority, may not be criminal procedure within the meaning of the British North America Act, yet they have a very close analogy to it, relating as they do to what has been described as provincial criminal law, the dividing line between which and the criminal law, which is the subject of the jurisdiction of Parliament, is shadowy and uncertain. Considering, therefore, the provisions of the Judicature Act alone and their apparent scope and object, I should have thought it was not intended by the Legislature that there should be an appeal to this Court from an order of the High Court quashing a conviction. We are not, however, without light from other statutes. In the same session as that in which the Judicature Act was passed, by another Act passed on the same day, viz., 44 Vict. ch. 27, an appeal was, by section 17, expressly given to this Court from an order of the High Court quashing a conviction for breach of the Liquor License Act or its amendments, when the Attorney-General of the Province certified that the point "was of sufficient importance to justify the case being appealed." This section is now sec. 121 of R. S. O. ch. 245, and under its authority the case of *Regina v. Hodge* (1882), 7 A. R. 246, a conviction for breach of some regulation of license commissioners under the Liquor License Act, was brought and decided. Clearly this was an unnecessary enactment, had the Legislature supposed that the Judicature Act, the chief Act of that session, had given any right of appeal in such cases. Some years after this, and after the decision of this Court in the case of *Regina v. Eli*, the attention of the Legislature was again directed to the subject, and by 52 Vict. ch. 15, sec. 3 (O.), R. S. O. ch. 91, an appeal was again expressly given to this Court from a judgment or decision of the High Court, or a Judge thereof, upon an application to quash a summary conviction made under a provincial statute, provided that the Attorney-General for Canada, or the Attorney-General for Ontario,

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

certified his opinion that the decision involved a question on the construction of the British North America Act, and that the same was of sufficient importance to justify the case being appealed. The immediate object of this Act was to have the decision of the High Court in *Regina v. Wason* (1889), 17 O. R. 58, reviewed. The decision of this Court is reported in (1890) 17 A. R. 221.

The Legislature thus again affirmed its opinion that special legislation was necessary to confer jurisdiction upon this Court to entertain appeals of this nature, and that such jurisdiction should be of a very limited character.

The appeal before us not being within either of the Acts referred to, is, like that in *Regina v. Eli*, a mere experiment and must be quashed with costs, including the costs of the motions and proceedings in Chambers.

Appeal quashed.

R. S. C.

SONS OF SCOTLAND BENEVOLENT ASSOCIATION V.
FAULKNER.

Estoppel—Res Judicata—Benevolent Society—Dispute as to Age of Applicant.

After an application for membership in a benevolent association had been accepted a dispute arose as to the applicant's age, and an action was brought by him to compel the association to issue to him a certificate of membership. This action was settled, the association accepting an affidavit of the applicant's brother as proof of his age and thereupon issuing the certificate of membership. Subsequently the association brought this action asking for cancellation of the certificate on the ground that the applicant's age was not in fact that stated by his brother:—

Held, that nothing less than clear proof by the association of the actual age of the applicant, and of fraud in procuring and making the affidavit, would suffice to undo the settlement and entitle the association to cancellation of the certificate.

Judgment of MEREDITH, C. J., affirmed.

APPEAL by the plaintiffs from the judgment at the trial. *Statement.*

The plaintiffs were a duly incorporated fraternal insurance association, and in April, 1891, the plaintiff applied to be admitted as a member. By the rules of the association applicants had to be under a certain age, and in his application the defendant gave the date of his birth and signed a declaration as to the truth of this and other statements therein contained. The defendant's application was accepted, and he was initiated, but before the necessary certificate of membership was issued, the plaintiffs, having been informed that the defendant's age had been incorrectly stated and that he was in fact older than the age fixed by their rules, rescinded their acceptance and refused to issue a certificate. The defendant then brought an action to compel the plaintiffs to issue a certificate. After this action was at issue a motion to dismiss it for want of prosecution was made, and on that motion the following order was made:

Upon the application of the defendants to dismiss this action for want of prosecution, the plaintiff not having given notice of trial thereof, and upon reading the affidavits of Donald Murdoch Robertson and of John Dickin-

Statement. son, filed in support of the said application, with the pleadings in this action, and the exhibits in the said affidavits referred to, and the affidavits of the plaintiff and of John Murray Clark, filed in answer, with the exhibits in the said affidavits mentioned, and the further affidavits of the said Robertson and of the said Dickinson, filed in reply, with the exhibits in the said affidavits referred to, and upon hearing both parties by counsel, after four enlargements of the said application, and the plaintiff consenting to so much of this order as confirms the settlement of the action hereinafter mentioned :

It is ordered that the settlement of this action proposed by the plaintiff's solicitors on the 6th day of January last and accepted on the same day by the solicitors for all the defendants, be, and the same is, hereby confirmed, which said terms of settlement are in the words and figures following :

1. That the defendants shall accept proof by affidavit in the form and to the effect of the affidavit annexed to the said memorandum of settlement, marked "A," made by plaintiff's brother in Ireland, that plaintiff is of Scotch descent, and at the time of his alleged initiation into the Sons of Scotland was under fifty-five years of age ; also an affidavit of some other disinterested person in Scotland corroborating the fact that plaintiff is of Scotch descent, such affidavit to be in the form and to the effect of the affidavit annexed to the said memorandum of settlement and marked "B."

2. That said affidavits are to be prepared and procured by the plaintiff's solicitors at the plaintiff's expense.

3. That the defendants will forthwith prepare a certificate in the usual and proper form shewing that plaintiff is insured by the defendant Grand Camp in the sum of \$1,000 as of the date of his admission into the order (14th May, 1891), and upon delivery of affidavits as herein set forth will forthwith deliver or cause said certificate to be delivered to the plaintiff or his representatives.

4. That plaintiff's costs taxed as between party and

party to the 6th day of January, 1893, but not including Statement.
reply, shall be paid by the defendants to the plaintiff upon the delivery by him of the affidavits as herein provided.

And it is further ordered that this action be, and the same is hereby dismissed, on the above terms and conditions.

And it is further ordered that the plaintiff do pay to the defendants their costs of this application to be taxed, and that the plaintiff may forthwith tax any costs which in the course of this action have been made payable to him in any event of the action, and that any such costs of the plaintiff which are payable by the defendants above named may be set off against the costs hereby ordered to be paid to such defendants by the plaintiff.

Chambers, 27th November, 1893.

The plaintiff in that action appealed from this order, but his appeal was dismissed on the 18th of December, 1896.

Affidavits in the form referred to in the order were subsequently procured, and the plaintiffs issued a certificate of membership in the defendant's favour, under which he became insured under certain conditions in the sum of \$1,000.

On the 24th of November, 1897, the plaintiffs brought this action, asking that the settlement should be set aside and the certificate cancelled, on the ground that the affidavits were false and had been falsely and fraudulently procured, and that the defendant was, in fact, at the time of his application, older than the age limited.

The action was tried at Toronto on the 12th of September, 1898, before MEREDITH, C. J., who, at the close of the case, gave judgment as follows:—

MEREDITH, C. J.:—

What was the position of matters at the time the other suit was brought? The association was asserting that it was not bound to issue a certificate to the defendant,

Judgment.
MEREDITH,
C.J.

because, as it said, he had not become a member of the organization. It said that he had made a false representation as to his age—that he was above the age of fifty-five, which was the limit of age at which persons should be admitted—beyond which persons should not be admitted into the organization. That was the issue. The parties came to a settlement, and that settlement has been confirmed by an order of the Court. The terms of the settlement are that the defendants—that is, the plaintiffs in this action—are to recognize Faulkner's right to the certificate if he shall procure an affidavit from his brother George Faulkner, shewing that he was not fifty-five years of age at the time his application was made, and also procure an affidavit from him or somebody else in the old country shewing that he was of Scotch origin. Now, supposing neither of these conditions had been imported into the settlement, but that the settlement had been that they should issue the certificate and pay the costs, could there be any question that this was *res judicata*, that the matter was determined and settled by the judgment of the Court? It is made conditional upon his doing two things, procuring these two affidavits. These two affidavits are procured and delivered to the officers of the association. After deliberation they determine that they are satisfactory and accept them.

It seems to me that it is not open to them after this to turn round and say: "We will fall back on our original position that we were induced by fraudulent representations to admit you as a member, and we are not bound." It does not appear there was any communication between the defendant and George Faulkner, or between him and the other persons in Scotland. While I do not decide the point, there seems to me very strong ground for contending that upon the delivery of these two affidavits the defendants—that is, the plaintiffs in this action—were absolutely bound by them. But I think they have not displaced the *prima facie* case that those affidavits were true. The onus was upon them to prove that they were

untrue; and I think, taking into consideration what they have said in regard to the plaintiff, the fact that the then plaintiff—the defendant in this action—has made a subsequent statement and has not gone into the box, is not of importance in determining this case, because, if he did not know his age correctly, according to their own view of the case, how can they ask me to accept that against the statement of the brother of Faulkner which they agreed to accept as conclusive as to their liability to accept him as a member of the organization?

I think the plaintiffs' case fails, and that the action must be dismissed.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 23rd of March, 1899.

Watson, Q.C., and *J. J. Macleennan*, for the appellants. Under the settlement of the previous action the appellants became bound to issue a certificate in the usual form, and that certificate was issued upon the faith of the statement as to the applicant's age. Having now found that statement to be false, the appellants are entitled to have the certificate cancelled, just as if there had been no previous litigation and the certificate had been voluntarily issued. It is a fallacy to say that the question has been adjudicated upon; this is a new issue and should be dealt with on the merits. On the evidence it is plain that the applicant's age is greater than that limited by the rules and he should be declared ineligible for membership.

J. M. Clark, and *R. U. McPherson*, for the respondent. The issue involved in the previous litigation is the same as that involved in this action, and the doctrine of estoppel applies. The terms imposed in the previous action were complied with, and it is too late for the appellants to recede from their agreement. At any rate, the evidence does not shew any error or misstatement, and the appellants have failed to prove what must be the foundation of their case.

Watson, in reply.

Judgment.
MEREDITH,
C.J.

Judgment.

Moss,
J.A.

May 9th, 1899. The judgment of the Court was delivered
by
Moss, J. A.:—

In the circumstances of this case nothing less than clear proof that at the date of his initiation in May, 1891, the defendant was over fifty-five years of age, and that there was actual fraud in procuring and making the affidavit or declaration of the defendant's brother George Faulkner, would suffice to undo the settlement of the former action, and avoid the certificate issued and delivered in pursuance of it. It may be that proof of the untruth of the statement in the declaration as to the date of the defendant's birth would go some distance towards establishing fraud in the making of it, but the plaintiffs were bound to shew the contrary of the facts therein stated otherwise than by shewing that the defendant subsequently made statements differing therefrom, before they could raise even an inference of fraud in procuring or making the brother's declaration.

The plaintiffs urge that the production of the defendant's subsequent letters and declarations to the effect that he was born on the 19th of December, 1832, establish the plaintiffs' case in the absence of explanatory evidence.

But the question as to when the defendant was born had arisen in the former action, before the issue of the certificate which is now sought to be avoided. One of the principal questions in that action was whether, at the time of his initiation in May, 1891, the defendant was under or over the age of fifty-five. In the settlement of the action it was amongst other things agreed—and the agreement was embodied in an order of the Court—that upon the defendant producing to the plaintiffs an affidavit of his brother George Faulkner, shewing the defendant to have been under the age of fifty-five years at the date of his initiation, the plaintiffs would issue and deliver to the defendant a certificate shewing him to be insured in the Grand Camp for \$1,000, as of the date of initiation.

George Faulkner's affidavit or declaration was procured and handed to the plaintiffs, who accepted it as a compliance with the terms of the settlement, and issued and delivered to the defendant the certificate as agreed.

Judgment.

Moss,
J.A.

There is no evidence of fraud or want of good faith in the procuring or making of the affidavit or declaration, and really nothing to shew that the statements made in it are untrue.

The defendant's unsworn statements do not prove the untruth of his brother's sworn statements. The latter is the elder, and is more likely to have better knowledge than the defendant of the true date of his birth, for he could only know of it by information derived from others.

The evidence shews that it was considered at the time of the settlement that the defendant's knowledge of the date of his birth could not be relied on, and for this, amongst other reasons, it was agreed to accept the affidavit or declaration of his elder brother.

If the former action had proceeded to trial, and the testimony of George Faulkner to the same effect as in his affidavit or declaration had been adduced and accepted by the Court, and the issue of a certificate directed by the judgment of the Court, it would be hopeless for the plaintiffs to expect to set aside the judgment and certificate upon such proof as they have given in this action.

And there is substantially no difference between what was done and a judgment after trial.

The appeal should be dismissed.

Appeal dismissed.

R. S. C.

IN RE LAZIER.

Extradition—Forgery—Initiating Prosecution.

The prisoner, using an assumed name, represented himself to a shopkeeper to be a traveller for a certain wholesale firm, and after going through the form of taking an order for goods, obtained the endorsement of the shopkeeper to a draft drawn by him in his assumed name on this firm, and this draft was then cashed by him at a bank :—

Held, that this was forgery and that the prisoner should be extradited. A prosecution under the Extradition Act may be initiated by any one who, if the offence had been committed in Canada, could put the criminal law in motion.

In re Burley (1865), 1 C. L. J. 34; *Regina v. Morton* (1868), 19 C. P. 9, approved.

Judgment of MEREDITH, C. J., 30 O. R. 419, affirmed.

Statement.

THIS was an appeal by the prisoner from the judgment of MEREDITH, C.J., reported 30 O. R. 419, and was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 30th of March, and 1st of April, 1899. The facts and authorities relied on are stated in the report below and in the judgments in this Court.

R. G. Smyth, for the prisoner.

P. J. M. Anderson, and *J. W. Curry*, for the prosecutors.

May 9th, 1899. BURTON, C. J. O. :—

I adhere to the view which I expressed in *In re Murphy* (1895), 22 A. R. 386, but this seems to me to be a very different case.

The onus—the real name of the prisoner being proved—was upon him to shew that he used the name innocently and for no improper purpose. Here it was shewn that he not only assumed the false name for the purpose of committing the particular fraud, but that he represented himself as a traveller for the firm of T. Kingsford & Son,

whose bill head he produced as if to shew the authority he was assuming.

It is very much like *Rex v. Dunn* (1765), 1 Leach 57, where the prisoner pretended to be the widow of a deceased seaman and obtained a sum of money on the strength of there being an amount due to him for wages, and then signed a promissory note as Mary Wallace with intent to induce the person advancing the money to make that advance. There nine of the Judges held the crime to amount to forgery, although she professed it to be her own note and not that of another, but she obtained the credit on the faith of her being the widow of the deceased sailor, as here the draft was cashed on the faith that the prisoner was what he represented himself to be, a traveller of the firm on whom he was drawing.

I am of opinion, therefore, that this appeal should be dismissed.

OSLER, J.A. :—

The prisoner was committed for extradition on four charges of forgery—two committed in the State of Pennsylvania, one in the State of New York, and one in the State of Ohio. He was brought before Meredith, C.J., under a writ of *habeas corpus*, and was remanded, the learned Chief Justice being of opinion that a valid cause of detention for the offence of forgery was shewn. He is now brought before us on an appeal from that decision.

For the purpose of the appeal it is sufficient to refer to the facts relating to one of the charges, the *modus operandi* adopted by the prisoner, whose real name is Marcus B. Lazier, being the same in all except that he used a different name or alias.

He went to the shop of one H. T. Achre, a dealer in groceries, at Sharpsville, Pa., and there represented himself to be M. C. Ballard, and an agent or traveller for T. Kingsford & Son, starch manufacturers, of Oswego, N.Y. As such he applied for and obtained from Achre an order for the supply of a quantity of starch, which was taken on a

Judgment,
BURTON,
C.J.O.

Judgment.

OSLER,
J. A.

form ordinarily used by travellers, and purporting to be a blank form of the firm in question.

Having obtained the order, he left the shop and shortly afterwards returned and requested Achre to endorse a draft for him on Kingsford & Son for \$50, stating that it was a draft on his employers for expenses and that he had authority to make such a draft upon them for that purpose. Achre, believing these statements, endorsed the draft and it was then presented by the prisoner to and cashed by a local bank.

There was no such person as M. C. Ballard, and the prisoner was not and had never been in T. Kingsford & Son's employment, and had no authority to take orders for them or to make a draft upon them for any purpose.

The proceedings for extradition were commenced by information taken before His Honour E. B. Fralick, Junior County Court Judge of Hastings, a Judge under the Extradition Act.

The facts above stated were fully proved by proper evidence for the purpose under the Act, but there was no evidence that any of the proceedings were taken on information or complaint laid by or under the authority or direction of the Government of the United States, and it was argued that for this reason the proceedings before the extradition Judge were void and that he acted without jurisdiction.

It was also contended that the evidence was insufficient to prove the offence of forgery.

I am against both these objections. As to the first: Whatever may be the practice in the United States, our practice, as long as I can recollect, has been uniformly opposed to it. With us it has always been held that proceedings in extradition might be regularly initiated before an extradition Judge just as they might be taken before a magistrate for an offence committed in our own country. The Act, section 6, in plain terms permits them to be so taken, and I think it was the necessary consequence of the legislation (12 Vict. ch. 19) referred to by the learned Chief Justice below, that the proceedings in this country might

be taken not only without any warrant from our own Executive to signify that a requisition had been made by the authority of the United States for the extradition of the offender, but without any such requisition having been in fact made, because the proof of such requisition could only be made to our judicial officers by or through the medium of our own Executive Government.

Full protection is afforded to the prisoner by the provision of the Act, sec. 6, sub-sec. 2, and sec. 15, to which the Chief Justice also refers, which requires the extradition Judge who issues the warrant for apprehension of the offender forthwith to report the proceedings to the Minister of Justice.

In truth the question which has now been raised was decided in *In re Burley* (1865), 1 C. L. J. 34, and again in *Regina v. Morton* (1868), 19 C. P. 9, where the course of legislation up to that time is traced by J. Wilson, J. It is enough if the requisition of the foreign state is made in due time after the commitment for surrender.

I am also of opinion that the evidence makes out a *prima facie* case of the commission by the prisoner of an extradition crime, namely, forgery—forgery at common law—under the authority of such cases as *Rex v. Dunn* (1765), 1 Leach 57; *Rex v. Peacock* (1814), Russ. & Ryan 278; *Rex v. Bontien* (1813), *ib.* 260; *Regina v. Whyte* (1851), 5 Cox C. C. 290; *United States v. Mitchell* (1831), Baldwin (U. S. Cir. Ct.) 366. For (1), the credit was not personal to himself alone without relation to any other. He was credited upon his false representation, not as a man bearing the name of M. C. Ballard, but as M. C. Ballard, traveller and agent of T. Kingsford & Son, with authority to make the draft in question upon them and thus to give their security for the liability which might be incurred upon the bill, in other words credit was given to the bill and not to the prisoner; and (2), the false name was assumed, not for the purpose of concealment and fraud generally, but for the purpose of the very fraud of which the false bill was the subject. The prisoner had never used or gone by the name of M. C. Ballard. It was not

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

his name, and he used it on this occasion to perpetrate this very fraud by making the draft in that name as if it were his own. Therefore, he made the note in the name of another as if his own with intent to defraud, and whether, under these circumstances, there was a person of that name or not, is, as I understand the cases I have cited, immaterial.

There is a useful discussion of the question of the forgery of fictitious names in an article in 30 American Law Review, N. S. (1890), p. 500. The circumstances I have mentioned easily distinguish the present case from that of *In re Murphy* (1895), 22 A. R. 386, in which I was of opinion that the offence of forgery had not been committed, as also from that of *The Queen v. Martin* (1879), 5 Q. B. D. 34. There the prisoner, whose name was Robert Martin, gave the prosecutor a cheque for the price of goods sold to him, to which he signed the name William Martin. The prosecutor knew him well, and knew his name was Robert, but did not observe that he had signed it by a name different from his real name. The cheque was given and received as the prisoner's own cheque. He got no credit by signing it William instead of Robert, and there was nothing whatever from which the motive of the prisoner in signing a wrong Christian name could be gathered. There was, therefore, a plain case in which the credit was given to the prisoner himself, who had been known to the prosecutor for twenty years, and not to the name in which the cheque had been signed. Here the prisoner says: "This is the bill of M. C. Ballard, agent of T. Kingsford & Son, with authority to draw it upon them. I am that person." It cannot be said that under these circumstances the credit was given wholly to himself without any regard to the name or any relation to a third person.

I think that the appeal should be dismissed.

MACLENNAN, MOSS, and LISTER, JJ. A., concurred.

Appeal dismissed.

R. S. C.

SAUNDERS V. CITY OF TORONTO.

Master and Servant—Negligence—Independent Contractor.

The relationship of master and servant does not exist between a municipal corporation and a teamster hired by them by the hour to remove street sweepings with a horse and cart owned by him, the only control exercised over him being the designation of the places from which and to which the sweepings are to be taken, and the municipal corporation are not liable for an accident caused by his negligence while taking a load to the designated place.

Judgment of a Divisional Court, 29 O. R. 273, reversed, Moss, J.A., dissenting.

THIS was an appeal by the defendants from the judgment of a Divisional Court, reported 29 O. R. 273, and was argued (by consent) before BURTON, C.J.O., OSLER, MACLENNAN, and MOSS, JJ.A., on the 3rd of February, 1899. The facts are stated in the report below, and the authorities relied on are there mentioned. Statement.

Fullerton, Q.C., for the appellants.

N. B. Gash, for the respondent.

May 9th, 1899. BURTON, C.J.O.:—

The plaintiff, whilst riding upon his bicycle on Bathurst street, in this city, came into collision with a cart which was being used by a person named McGowan, alleged to be an employee or servant of the defendants, engaged in the course of his employment as scavenger or street cleaner, as it is alleged through the gross carelessness of that employee.

The defence is that that person was not in the position of a servant, and that the injury was caused by the want of care of the plaintiff. At the trial the learned Judge nonsuited on the ground that upon the evidence the relationship of master and servant had not been established, and that is the only point before us upon this appeal.

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C.J.O.

The learned counsel for the respondent cited several cases, ending with *Foreman v. Mayor of Canterbury* (1871), L. R. 6 Q. B. 214, which I have felt it my duty to examine, but they seem to me to establish nothing more than this, which I did not understand the defendants to contest, and which, of course, they could not successfully contest, that a municipal corporation, as well as any other employer, is liable to third persons for the torts, negligences and other malfeasances of their servants in the course of their employment, but the question before us is whether that relationship did exist, and whether the learned trial Judge was right upon the evidence before him in holding, as a matter of law, that the defendants were not liable for McGowan's acts, or whether there was any evidence which ought to have been submitted to the jury.

McGowan was the owner of the horse and cart, and he and the horse and cart were hired at so much an hour for the purpose of removing filth and scrapings from the streets, and he was under the control, authority and direction of the defendants to the extent mentioned in the extracts I am about to make from the evidence of the witnesses, and not otherwise.

Brown, a sub-foreman of the defendants, and having authority to make the engagement, engaged McGowan on the day in question, and, as he says, just started him at his work. McGowan and others would apply to him for work, some with horses and carts and others without. If there was work to do they would be told to go to work without any particular bargain being made.

The only instructions given to them were to tell them where they would find the stuff or refuse to be moved, and to tell them where to dump it, but the witness admits that he had no control over his driving, and had power only to direct him where he was to dump the refuse.

The defendants also appointed a street commissioner whose duty it was to exercise a general supervision over the repairing and cleaning of the streets, including the scavenger work, but the hiring of persons to do that work was

entrusted to foremen appointed by him, one of whom was a person of the name of Bromley, under whom Brown was a sub-foreman. The street commissioner defines their duties and powers.

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He is asked as to their control, and he says they were simply to instruct the employees to do the work, and he further explains as to the way to get the load and to take it to the dump. Asked as to anything else, he says "no, the foreman has no other control over them only to see that they do their day's work." "We do not care where a man goes as long as he reaches the dump in a reasonable time. We have no control over him whatever as long as he reaches the dump in a reasonable time."

That is all the evidence, and the question is whether upon that evidence the learned Judge was justified in holding as a matter of law that the relationship of master and servant was not made out. I do not myself see how this case differs from *Jones v. Corporation of Liverpool* (1885), 14 Q. B. D. 890, where the inspectors of the defendants directed the driver what streets to water. Here the foreman directed McGowan where to dump the refuse. If he had interfered when the accident happened by directing McGowan to swing his cart round as he did the case might be different, but he exercised no other control than directing where he was to load the cart and where to discharge the load.

I think the true test of whether the liability exists is that stated by Lord Justice Bowen, not the exercise of the power of control, but the right to exercise the power of control. In *Stephen v. Thurso Police Commissioners* (1876), 3 Court of Sess. Cas., 4th Series, 535, the contract contained a provision that the contractor should be under the immediate order of the inspector, or, in his absence, of the clerk of the commissioners, which at once destroyed the character of the contract as an independent contract.

The case of men engaged to drive the horses and wag-gons belonging to the city, and the case of a man engaged by the city to drive his own horse and cart appear to me

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to be essentially different. It was incumbent upon the plaintiff to shew that the defendants had the entire control of the acting or mode of acting of McGowan, if not he cannot be treated as their agent so as to make them responsible.

In the recent case of *Jones v. Scullard*, [1898] 2 Q. B. 565, it was held that there was evidence to go to the jury of negligence upon the facts of that case, the defendant being the owner of a brougham, horses and harness, and the stable keeper being in the habit of supplying the driver merely. On the occasion in question there was a driver who had been continuously employed in driving the defendant, and was wearing a suit of livery supplied by the defendant. The learned Chief Justice left the question of negligence only to the jury, the question of who was liable for the negligence being reserved for further consideration, it being agreed that the Chief Justice should have power to draw all necessary inferences of fact.

There the learned Chief Justice after a very full review of the decisions, says the principle to be extracted from the cases is that if the hirer simply applies to the livery stable keeper to drive him between certain points, or for a certain period of time, and the latter supplies all necessary for that purpose, the hirer is in no sense responsible for any negligence on the part of the driver, but that it is a different case when the brougham, the horse, the harness and the livery, are the property of the person hiring the services of the driver, and in that case, especially as the driver had driven the hirer for a considerable period of time and had been approved of by him, and at the time of the accident was wearing a suit of livery which had been supplied by the defendant, it was held that there was evidence for the jury that the driver was acting as servant of the defendant. But it is by no means clear that that would have been the conclusion if the livery man had furnished the whole equipage.

The fact that McGowan was engaged with his horse and cart to my mind makes all the difference. It may

seem a little out of the way to dignify the bargain with the name of a contract, but I cannot think that it differs in principle from a case like *Jones v. Corporation of Liverpool* (1885), 14 Q. B. D. 890. I fail also to see the distinction relied upon between this case and *Quarman v. Burnett* (1840), 6 M. & W. 499, and *Jones v. Corporation of Liverpool*, because in those cases the relation of three parties had to be ascertained. It surely cannot be claimed that the responsibilities of the parties would have been different if in the two cases cited the livery stable keeper had gone himself instead of sending his servant; it would have been equally necessary to establish that he had for the time being placed himself under the complete control and direction of the hirer, and in the *Liverpool* case that the contractor had for the moment ignored her sex, and undertaken the somewhat unfeminine occupation of driver of a watering cart. The liability in all these cases must be the same and dependent upon the same principle.

If there had been any evidence in conflict with that of the street commissioner and the foreman I can understand the case going to a jury to find the facts, but upon those facts it would be for the Judge to say whether in point of law the defendants were liable, but here the evidence is all one way, and the onus on the plaintiff. I agree with Mr. Justice Meredith that the jury would not have been bound to accept the foreman's notion of the defendants' control over the workman if there was any conflict of evidence, but that is all the evidence there is, and the jury should not have been allowed to speculate as to the liability of the parties without evidence. The onus was upon the plaintiff to shew that McGowan was a servant of the defendants, or if he was a contractor, that the defendants had retained full power and control over him and his horse, and not the mere power to approve or disapprove of the work, or to give such limited instructions as to where he should pick up the refuse and where dump it. I fail to see any distinction between such a case and *Jones v. Corporation of Liverpool*, where the Court

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held that there was no case for a jury. I agree in the view of the law taken by one of the Judges in the Scotch case in the following extract from his judgment (*Stephen v. Thurso Police Commissioners* (1876), 3 Court of Sess. Cas., 4th Series, 535, at p. 542):

“ Was there a control or direction of the person in opposition to a mere right to object to the quality or description of the work done? Where this element of personal control is found, then responsibility, either for malfeasance or nonfeasance, for fault or negligence, will attach, not only to the servant or workman (he is always liable), but to him who had the personal control over him, who was his superior in the sense of the maxim. On the other hand, if an employer has no such personal control, but has merely the right to reject work that is ill done, or to stop work that is not being rightly done, but has no power over the person or time of the workmen or artizan employed, then he will not be their superior in the sense of the maxim, and not answerable for their fault or negligence.”

It may seem to be a somewhat refined distinction to hold that there is a liability on the part of the corporation where men are engaged to drive the city's horses, and none in that of a person engaged with his own horse and cart and not controlled by the city, but I think the distinction is well established by the cases and appears reasonable.

The case of *Linnehan v. Rollins* (1884), 137 Mass. 123, proceeded upon the grounds to which I have already adverted, that the defendants retained in the contract the power to control the work.

I think the law is well summarized in the judgment of the Lord Justice-Clerk in the Scotch case.

In the first place the master is liable for the injurious act of his servant. In the second place, if the wrongdoer be a contractor who is subject to the control of his employer, the latter is responsible; and in the third place, if the contractor be independent and may do as he pleases as regards the execution of the work, he is to be viewed as the principal, and alone is liable.

I think that upon the evidence the plaintiff has not satisfied the onus that was upon him, and that the learned trial Judge was right in holding that the corporation were not liable, and that his judgment should be restored.

Judgment.

BURTON,
C.J.O.

OSLER, J. A.:—

I think the judgment of my learned brother MacMahon at the trial should be restored, being of opinion that there is no evidence upon which the defendants can properly be held answerable for the negligence of McGowan, which is said to have caused the injury complained of.

McGowan was a carter who had a horse and cart of his own. His manner was to go to a street where street cleaning was to be done and procure himself to be employed by a foreman under the defendants' street commissioner at so much an hour to cart away the sweepings and rubbish from the street to the dump. He might, it seems, have been directed by what route to go to the dump, though this does not appear to have been done on any occasion, and he was practically at liberty to choose his own route. Other control over him in the matter of driving or managing his horse and cart the defendants had none. He might have been dismissed at the end of any hour or at the end of a day, and the defendants were not bound to employ him again. He had in fact been thus engaged as a "casual" on these terms during the greater part of the months of January, February, March and April, 1897, and on the 28th of the latter month, while engaged in conveying a load in his cart to the dump, by some negligence on his part in the management of his vehicle, collided with the plaintiff, who was in the act of riding past him on his bicycle.

The question is in what relation he stood to the defendants. Was he their servant or was he an independent contractor? I think that the only conclusion which the evidence admits of is that the latter was his real character.

Judgment.

OSLER,
J.A.

The distinctions drawn in some of the cases are extremely fine, but there seems to be no real difficulty in applying here the test which has been suggested as the legal criterion whether the relation of master and servant existed between McGowan and the city, viz., whether the latter had the power of controlling the work he was doing for them in respect of anything not necessarily involved in the proper doing of the work. I think they had not. In other words they had no control over the means by which the work was being done. They could not have placed another driver in charge or have ordered McGowan to take care of his horse and cart in any particular manner, as by driving fast or slow or on one side of the road or the other, nor does it appear that they would have had any right to complain, if, instead of driving himself he had chosen to place his son or any one else in charge of the vehicle for the hour or for the day. His business was a humble one, it is true, but as possessor of the horse and cart, by means of which he carried on the small transactions he was engaged in, it would appear to me to be rightly described as an independent one, and something different from that of a person employed merely as a labourer to drive a horse and cart the property of the city. In *Sadler v. Henlock* (1855), 4 E. & B. 570, referred to in the judgments below, the defendant had, from the inception of the work to its end, the power of controlling the action of the labourer whom he had selected or employed to do it, by directing in what manner it should be done, and whether or not the street should be opened to do it, and how the opening, if made, should be filled or repaired.

In principle I think the case not distinguishable from *Quarman v. Burnett* (1840), 6 M. & W. 499, or *Jones v. Corporation of Liverpool* (1885), 14 Q. B. D. 890. Can the fact that in these cases the relations of three persons were involved make any real difference? In the one the job-mistress or stable-keeper, and in the other the contractor with the city, sent a driver with the horses, and the question was whether the driver was the servant of the senders or of those for whom the work was being done. In its last

analysis the question still was whether the case was one of master and servant or employer and contractor. The driver being held in each case to be the servant of the latter, involved the decision that if the stable keeper in the one and contractor in the other had herself undertaken to drive instead of sending some one else, she and not the person for whom the work was being done would have been liable. See *Huff v. Ford* (1878), 126 Mass. 24, cited in vol. 14 of the American and English Encyclopædia of Law, a case like *Jones v. Corporation of Liverpool*, except that there the action was brought against the person who let the team and driver to the city, that is to say, against the master of the driver. I refer also to *Stephen v. Thurso Police Commissioners* (1876), 3 Court of Sess. Cas., 4th Series, 535, and the judgments of the Lord Justice-Clerk and of Lord Ormidale.

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J.A.

The case of *Fink v. Missouri Furnace Co.* (1884), 82 Mo. 270, seems to me a well considered case in the defendants' favour; and see *Waters v. Pioneer Fuel Co.* (1893), 55 N.W. Reporter 52 (employee of coal company delivering coal through shoots on sidewalk and leaving them uncovered, etc.); *Cf. Holliday v. National Telephone Co.* (1899), 15 T. L. R. 483 (C. A.); *Penny v. Wimbleton* (1899), 2 Q. B. 72 (C. A.)

I agree that the question is one of fact. There is, as a learned text writer has remarked, much confusion in the authorities and much depends on the exact conditions of the employment and the exact circumstances of the case. My difficulty here is to see that there were any facts proved from which the jury could rightly infer that McGowan was the servant of the city in any sense which would make them responsible for his negligence in driving his cart in carrying on the work they engaged him to do. I fail to distinguish the case from that of a cab owner who may be employed daily to drive a person from his house into the city, or an expressman who is called upon by a shop keeper or merchant to take his goods to or from his place of business to the railway from one week's end to another. I think, therefore, that the appeal should be allowed.

Judgment. MACLENNAN, J. A. :—

MACLENNAN,
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I am of the same opinion.

Moss, J.A. :—

I have not been convinced that the Divisional Court erred in directing a new trial in this case, and therefore I am constrained to differ from my learned brothers who have adopted the contrary view.

I think there was evidence upon which a jury might reasonably come to the conclusion that McGowan was the servant of the defendants, engaged in their business and acting in the course of his employment at the time when the accident happened. The defendants engaged him to take part with numerous other workmen in the task of removing sweepings and refuse matter collected in heaps by the defendants' employees in the course of street cleaning. He was taking part along with a number of other men in that kind of work, some driving horses and carts owned by the defendants, others like himself driving their own horses and carts, but all engaged and paid at certain rates per hour for men, when men only were engaged, and at certain other rates per hour for horses, carts and drivers, when all were hired together, in accordance with the civic regulations governing the employment and payment of labourers of their class. He got his pay weekly in the same manner as all the other labourers in the defendants' employ.

He did not undertake a job of removing a specific quantity of refuse or sweepings for a specified sum, or of removing all such refuse or sweepings for so many yards or miles of street at so much per yard or mile. He was not working by the job or piece. He was not at liberty to do the work by deputy, nor to pick and choose his own time for doing it. He was a man engaged to work for the defendants at so much for every hour he worked. He was directed where to begin work and where and when to stop.

I do not agree that the nature of his engagement entitled him to send another in his stead. He certainly could not send another horse, cart and driver, and I do not think there is any evidence to shew that another driver would have been accepted in his place.

The evidence shews that his employment was a personal employment, just as much as if he had been hired without his horse and cart.

That the horse and cart were his was a mere incident. Its only result to him was that he received more pay weekly than if the horse and cart were not his.

If they had been hired of some one else, or if they were owned by the defendants and he had been employed and directed to drive them, could it be said that he was not the defendants' servant? If not, how does the circumstance that the defendants have hired the whole outfit, including him as driver, make him less their servant to do the particular work for which they hired him?

In performing the work he was hired to do, he was bound to conform and did conform to the directions and orders of those placed in authority over him by the defendants.

The power of direction and control was reserved to and was in the defendants, and in doing their business he had no more right to drive carelessly or negligently while going to and from the dump than if he was driving a horse and cart the property of the defendants.

While I thoroughly recognize that upon a question of this kind there is no occasion for resort to American decisions, I may be permitted to refer to the case of *Waters v. Pioneer Fuel Co.* (1893), 55 N. W. Reporter 52, because in its circumstances it more nearly resembles this case than any of our own that I have been able to find, and it contains a useful discussion of the question of servant or independent contractor.

The person for whose act the defendants were held liable had applied to the defendants for work and had worked for them almost every day for three months delivering

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coal. He was paid thirty-five cents per ton for delivery, and got his pay every week. He owned the team and the running gear of the waggon. The defendants furnished the waggon box. He was not sure of business every day and could quit when he wanted to. He had not, however, quit or been discharged when the coal, in delivery of which the negligence occurred, was delivered. When the order for this ton of coal came it was delivered to him to execute. He loaded the coal and took it to the specified place and delivered it, and procured a receipt acknowledging the receipt and returned it and the money for the coal to the defendants. While delivering the coal he opened a coal hole in the sidewalk and afterwards replaced the cover so negligently that the plaintiff in walking over it fell through and was injured.

It was held that this evidence shewed that the person who delivered the coal was in the service of the defendants, representing them in the details of the work enumerated, and while he remained in their employment was subject to their control.

The decision is, of course, not of authority with us, but it seems to point to what I conceive to be the differences between such a case as the present and *Quarman v. Burnett* (1840), 6 M. & W. 499, *Jones v. Corporation of Liverpool* (1885), 14 Q. B. D. 890, and others of that class.

In this, as in the majority of cases of the kind, there is involved merely a question as to the possible inference from certain facts; and it seems to me that the facts shewn constituted evidence fit to be considered by the jury of the existence of the relationship of master and servant.

Appeal allowed, Moss, J.A., dissenting.

R. S. C.

KEEFER V. PHOENIX INSURANCE COMPANY OF HARTFORD.

Insurance—Fire Insurance—Vendor and Purchaser—Partial Interest.

A person who has only a partial interest in the subject matter may insure to the full insurable value of that subject matter, but in that event the policy must define in express terms the nature of the interest insured, and if there is any ambiguity the insured will be entitled to recover only the value of his own interest.

Castellain v. Preston (1883), 11 Q. B. D. 380; 31 W. R. 558, specially referred to.

A policy issued to a vendor, who had received part of his purchase money, insuring the buildings on the land in question in a specified sum, with a proviso that the insurers are "to indemnify and make good unto the said assured, his heirs or assigns, all such direct loss or damage not exceeding in amount the sum or sums insured as above specified nor the interests of the assured in the property herein described," does not cover more than the vendor's interest or enable him to recover for the benefit of himself and the purchaser the full value of the subject matter.

Judgment of FERGUSON, J., 29 O. R. 394, reversed, MACLENNAN, J.A., dissenting.

THIS was an appeal by the defendants from the judgment of FERGUSON, J., reported 29 O. R. 394, and was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 22nd of November, 1898. The facts and authorities relied on are stated in the report below. Statement.

Aylesworth, Q.C., and *G. L. Smith*, for the appellants.

H. H. Collier, for the respondents.

May 9th, 1899. BURTON, C.J.O.:—

The policy sued on was issued on the application of the plaintiff Keefer, apparently as the sole owner of the premises insured, against loss or damage by fire to an amount not exceeding \$2,000, or the interests of the assured in the property, and the loss, if any, was payable to the Quebec Bank.

In point of fact at the time of the application Keefer had agreed to sell the property and was interested in it only to the extent of \$1,200, but this was unknown to the insurers who dealt with him as absolute owner.

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It is clear that a person having a limited interest in property may insure, nevertheless, on the total value of the subject matter of the insurance, and that he may recover the whole value, subject to this, that the form of the policy must be such as to enable him to recover the total value, and that it must have been the intention at the time, both of himself and the insurers, to insure the whole value.

The former owner had insured the premises for the sum of \$2,000, the loss, if any, being payable to Keefer—what his interest was at that time does not I think appear, but probably as mortgagee.

Keefer afterwards purchased the property, and apparently the policy stood in the same position for some little time, because it was not until after a resale to George D. Cloy that Keefer applied for and obtained a policy in his own name.

By the sale to Keefer the policy issued to his predecessor presumably ceased to have any validity, but it was not until February, 1894, whilst the former policy, if valid, would have been still running, that Keefer applied for the policy now sued on, apparently in substitution for it, and although this was several months after his agreement to sell to George D. Cloy for \$2,000, and after he had received \$800 of his purchase money, he said nothing of this in his application, and had the policy issued for the full amount, the loss, if any, payable to the Quebec Bank.

Upon this is founded an argument that it was not his simple interest as vendor that was being insured, as his interest as vendor was limited to \$1,200, but it appears to me that this is scarcely so, as the vendee's interest is not referred to, and whatever might become payable under the policy was to be paid to the Quebec Bank.

It is, however, said that the use of the words "heirs or assigns" is sufficient to indicate that the vendee's interest is intended to be included, and the learned Judge has so held. With great respect, I am unable to agree in that conclusion. The word "assigns" is not usually inserted in a policy. There is a passage from Kent which I think correctly des-

cribes the law : " There is one event in which these policies are allowed to be transferred, and that is when any person dies the policy and the interest therein shall continue to the heir, executor or administrator, respectively, to whom the property insured shall belong. But, in all other cases, there shall be no assignment, and the party claiming the indemnity must have an interest in the thing insured at the time of the loss." In other words, when the property passes by operation of law the insurance continues, but any transfer by the assured himself puts an end to the policy, unless ratified in favour of the transferee by the assurance company.

The head note in *Lynch v. Dalzell* (1729), 4 Bro. P. C. 431, is : " Policies of insurance against loss or damage by fire, are not in their nature assignable ; nor can the interest in them be transferred from one person to another, without the express consent of the office."

Full effect can, however, be given to the word " assigns " here by reading it as an assignment of the assured's interest in the policy moneys in the event of loss, as we decided in *McPhillips v. London Mutual Fire Ins. Co.* (1896), 23 A. R. 524, which is accomplished in this case by making the loss, if any, payable to the Quebec Bank.

If the other contention were to prevail, pressed to its logical conclusion it would lead to this possible result, that if the property assured was absolutely sold and conveyed to a purchaser, such purchaser, without any consent or approval of the defendants, would be entitled to the benefit of the policy, which is a novelty in insurance practice which would surprise the insurance companies.

Then it is urged that the agreement to indemnify and make good to the assured all such direct loss or damage "not exceeding in amount the sum or sums insured as above specified, nor the interests of the assured in the property herein described," refers to more than the interests of one person and is an indication that the policy was not confined to Keefer's interest, but apart from the great danger of holding an insurance company liable upon such ambigu-

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ous expressions, are the words not satisfied by the fact that the assured has directed the loss to be payable to his assigns, and the direction assented to by the company, who, it must be remembered, had no notice or knowledge of the sale to Geo. D. Cloy, and who endeavoured to cancel the policy as soon as they heard of the sale?

The character of the assured is as much an element of risk as the construction of the building or its proximity to other buildings; the contract is a personal one, and it is, I think, manifest from the prompt manner in which the defendants endeavoured to cancel the contract when they found that Cloy was the purchaser, that they would not have insured him.

I do not pause to consider whether the parol agreement is admissible or not, because if it had been included in the agreement it never was brought to the notice of the company, and cannot make them insurers of any interest which they never intended to insure.

It is in the first place a singular agreement for the vendee to seek to have made. If the vendor had said so long as any part of the purchase money remains unpaid I require a policy of insurance to be kept up at your expense, one could understand it, but it may be explainable on the assumption that such an agreement as it is said could have been proved did exist and that the vendee expected the money to be applied in discharge of the unpaid purchase money. But what does it amount to? It is not alleged that the policy was to be kept alive for the absolute and ultimate benefit of the purchaser, but simply that so long as any portion of the purchase money remained unpaid the policy was to be continued, so that if the balance of \$700 purchase money had been paid the obligation of the vendor would have been at an end, but whatever the construction of the agreement it could not affect the defendants, who could not be made insurers against their will.

For these reasons I think the liability of the defendants, if any, is confined to the \$700 due on the purchase money.

It is contended on the part of the company that upon payment of this sum they are entitled to be subrogated to the position of the plaintiff Keefer. This point, though referred to on the argument, was not very fully gone into, the principal question being to what extent the plaintiff Keefer was entitled to be indemnified, the admissions being made chiefly with the view to the determination of that question.

No doubt the general principle as applied to insurance law is this, that it is a contract of indemnity, and of indemnity only, and means that the assured in case of loss against which the policy has been made shall be fully indemnified, but shall never be more than fully indemnified.

In order to ascertain whether upon this record and admissions a case has been made out for allowing the counterclaim we should have to consider the effect of the alleged verbal agreement as between the immediate parties to it, and we should be doing that in the absence of one of the parties to it. I have remarked upon the vague nature of that agreement as it appears upon these admissions, but it is quite possible that it may be found to go further when more fully investigated, and it may be that Keefer having been paid the \$700 may be bound to apply it on the purchase money, or it may be that default having been made in payment of the purchase money, and time being of the essence of the contract, the land has reverted to Keefer absolutely. These involve nice questions which should scarcely be decided in the absence of the purchaser. We think, therefore, that the safer course is to dismiss the counterclaim without costs, without prejudice to the right of the defendants to maintain a separate action as they may be advised.

The judgment below should be reversed and confined to the sum of \$700, which, having been tendered before action, entitles the defendants to judgment in their favour with costs.

The case of *Insurance Company v. Updegraff* (1853), 21 Pa. St. 513, has caused me to hesitate a good deal before

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finally coming to this conclusion, but on the whole I think that the inference cannot properly be drawn that the insurance company intended to insure anything beyond the owner's interest in the property: see *Castellain v. Preston* (1883), 11 Q. B. D. 380.

OSLER, J. A. :—

This case turns simply upon the question: What is the proper construction of the policy of insurance? Is it limited by its terms to the plaintiff's interest, which, though not disclosed to the company, was that only of an unpaid vendor, or is it an insurance not only for himself but for others interested, as for example, the vendee to the extent of the value insured? As Bowen, L. J., says in *Castellain v. Preston* (1883), (I quote from the Weekly Reporter, vol. 31, p. 558): "It is an illusion to suppose that the assured can in any case recover more than his loss. It is well known, of course, that a person with a limited interest may insure and recover the whole value of the thing insured, but then his policy must be apt for the purpose, and he must have intended so to insure." An instance of that kind is the case of a mortgagee: "He is entitled to insure for other parties, but if he only insures his own interest, he can only hold the damage to his own interest": *S. C.*, 11 Q.B.D. 380, 398. And see *Johnson v. Union Fire Insurance Co.* (1884), 10 Vict. L. R., Cases at Law, 154; *Howes v. Dominion Fire and Marine Insurance Co.* (1883), 8 A. R. 644, at pp. 648, 650; *Gill v. Canada Fire and Marine Insurance Co.* (1882), 1 O. R. 341. To the extent of what he recovers beyond the amount of his own interest, where the insurance is not so limited, he is trustee for others whose interests were intended to be covered. In the case at bar there is evidence that the insurance was intended to be for the benefit of the vendee as well as of the vendor. That is a question of fact which it seems to me is not complicated at all by the question whether the

agreement between the vendor and vendee in this particular could be proved by parol or not, not having been one of the terms of the written agreement for sale and purchase. The question is whether the policy is "apt for the purpose." I do not think it is. It is a contract between the parties for the payment of money in a certain event by the company to the plaintiff. What does the company covenant to pay? Not "the loss and damage not exceeding the sum insured to be estimated according to the actual cash value of the property." Had the contract assumed that form the plaintiff could probably have recovered the full amount of the policy: *Insurance Company v. Updegraff* (1853), 21 Pa. St. 513. The indemnity is on the contrary expressly limited to making good to the said assured, his heirs or assigns, the loss or damage not exceeding in amount the sum specified, nor the interests of the assured in the property, the amount of loss or damage to be estimated according to the actual cash value of the property. It appears to me that not only is the person insured the plaintiff, but that in terms it is his interest, within the limit of the sum insured, which the defendants are alone to be liable to make good. I cannot read the words "his heirs or assigns" as meaning those to whom he had already assigned the property insured, so as to embrace an assurance of the interest of his assigns. The words are controlled by the subsequent clause which limits the loss to the interests of the plaintiff himself in the property assured, and are fully satisfied so far as the word "assigns" is concerned by referring it to the assignment of any loss which may be sustained under the policy or even an assignment of his vendor's lien on the property insured. I think, therefore, that the appeal must be allowed and the action dismissed, as the amount of the plaintiff's interest was tendered before action and paid into Court. He is entitled to that sum but to nothing more.

As regards the counterclaim, I think the defendants fail. The agreement between Cloy and the plaintiff is

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OSLER,
J. A.

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OSLER,
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proved and to the extent of the plaintiff's interest as insured by the policy he is entitled to the benefit of the insurance. I cannot see that it matters in the least whether the agreement was by parol, or in writing, or under seal. It is only Keefer's right against Cloy to which the insurers can be subrogated. If as between them the latter is entitled to the benefit of the insurance I do not see anything to which the defendants can claim to be subrogated.

Moss, J. A. :—

Upon the best consideration I have been able to give to this case, I have come to the conclusion that the appeal ought to succeed.

I have not been able to find many decisions in which circumstances similar to those under which the claim is made have occurred.

The insurance in respect of which the plaintiffs sue was effected on the 28th of March, 1894.

On the 25th of July, 1893, the plaintiff Keefer had entered into an agreement, under seal, for the sale of the premises, on which the buildings included in the policy were situate, to one George D. Cloy for the sum of \$2,000.

By the terms of that agreement the purchase money was to be paid in certain instalments, and in addition to the usual reciprocal covenants for payment of the purchase money and conveyance of the premises upon payment, special provision was made for the purchaser being let into immediate possession, occupation and enjoyment of the premises; and it is to be presumed that possession was taken as agreed upon.

The immediate effect of this contract was that, as between the parties, the purchaser became the beneficial owner of the property—subject of course to the payment of the purchase money—entitled to the benefit of any improvement that might accrue between the date and completion of the contract, and bound to bear any loss which occurred, such as the destruction of the buildings.

The plaintiff Keefer, as vendor, held the premises in trust for the purchaser, but was a trustee in a qualified sense only, having a personal and substantial interest in the property, and a right to protect that interest.

Between the dates of the agreement and the policy, the purchaser made the first two payments of purchase money, thus reducing the amount due for purchase money to the sum of \$1,200.

In this position of the property Keefer effected the insurance now in question, but he did not disclose to the defendants the existence of the agreement for sale, nor the extent of his interest as an unpaid vendor.

The statements in the application would lead the defendants to suppose that he was the owner in fee with a tenant in possession of part, and there was nothing in the application to lead them to suppose that he was intending to insure the interest of any person but himself.

His insurable interest was that of an unpaid vendor with a lien for purchase money to the amount of \$1,200, and he had a perfect right to insure that interest.

No doubt it was quite competent for him to apply to insure, and for the defendants to agree to insure, not only his own interest but that of the purchaser; and, if the defendants' contract was that the insurance was to be upon the interest of the purchaser, Cloy, as well as that of the vendor, Keefer, there is no reason why the plaintiffs should not recover as they contend.

But I do not understand that the mere intention of Keefer to so insure can affect the defendants unless they agreed to insure more than Keefer's interest, and bound themselves to pay the value of the buildings if destroyed by fire, without reference to the extent of Keefer's actual personal loss by reason thereof.

The undertaking in the policy seems to me to aptly express an agreement to insure Keefer's interests, and his interests only. The earlier part states that the defendants insure him against all direct loss or damage by fire, "except as hereinafter provided," to an amount not exceeding \$2,000, to the

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premises, of which a description follows. Then it proceeds that the defendants "hereby agree to indemnify and make good unto the said assured, his heirs or assigns, all such direct loss or damage (not exceeding in amount the sum or sums insured as above specified, nor the interests of the assured in the property herein described), the amount of loss or damage to be estimated according to the actual cash value of the property." Here we have in plain language the following stipulations: (1) That the defendants are to indemnify and make good to Keefer his direct loss or damage, but (2) limited in amount to his interests in the property.

And this, I think, is what, in the absence of express stipulation to the contrary, the defendants would be held to have undertaken.

It is well settled that the contract of insurance against fire is a personal agreement with the person effecting the insurance by which the insurer contracts to indemnify the assured for what he actually loses by the happening of the events upon which the insurer's liability is to arise.

In *Castellain v. Preston* (1883), 11 Q. B. D. 380, at p. 386, Brett, L. J., thus states the rule: "The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified." Further on he proceeds to shew that in the application of the doctrine of subrogation the same rule of indemnity, and of indemnity only, must be adhered to.

Cotton, L. J., in the same case, at p. 393, says: "I think that the question turns on the consideration of what a policy of insurance against fire is * * . The policy is really a contract to indemnify the person insured for the loss which he has sustained in consequence of the peril insured against which has happened, and from that it follows, of course,

that as it is only a contract of indemnity, it is only to pay that loss which the assured may have sustained by reason of the fire which has occurred." Then he points out the manner in which the amount to which the indemnity extends is to be ascertained. He says: "In order to ascertain what that loss is, everything must be taken into account which is received by and comes to the hand of the assured, and which diminishes that loss. It is only the amount of the loss, when it is considered as a contract of indemnity, which is to be paid after taking into account and estimating those benefits or sums of money which the assured may have received in diminution of the loss. If the proposition is stated in that manner, it is clear that the office would be entitled to the benefit of anything received by the assured before the time when the policy is paid * *."

Judgment.

Moss,
J.A.

It is not disputed in the present case that prior to the happening of the fire Keefer had received all but \$700 of the purchase money under the agreement, but nevertheless the plaintiffs contend that they are entitled to recover from the defendants the whole loss or damage to the buildings, amounting to \$1,740.

If Keefer is awarded this sum he is recovering from the defendants much more than the indemnity against his actual loss or damage. He is only interested to the extent of \$700. His lien for unpaid purchase money is for that amount only. The test is, what real interest has he to entitle him to recover? What does he lose under this contract of indemnity if he fails to recover? The answer seems to be that payment of \$700 satisfies the amount of his claim and fully indemnifies him against any loss under his contract of sale.

In *Castellain v. Preston*, Bowen, L. J., says (p. 401): "Suppose for a moment that only £50 remained to be paid of the purchase money, and that a house had been burnt down to the value of £10,000, would it be in accordance with any principle of indemnity that persons who were only interested, and could only be interested to the extent of £50, could recover £10,000? They would be getting a

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windfall by the fire, their contract of insurance would not be a contract against loss * *. Then what is the principle which must be applied? It is a corollary of the great law of indemnity, and is to the following effect:—That a person who wishes to recover for and is paid by the insurers as for a total loss, cannot take with both hands. If he has a means of diminishing the loss, the result of the use of those means belongs to the underwriters.”

I do not think this case can be brought within any of the cases suggested by Bowen, L. J., of a person with a limited interest insuring upon and recovering the total value of the subject matter of the insurance, because, in my view, the form of the policy excludes the notion of any contract to insure more than Keefer's own interests, and so one, at least, of the provisions the Lord Justice speaks of is wanting.

Collingridge v. Royal Exchange Assurance Corporation (1877), 3 Q. B. D. 173, shews that Keefer is entitled to recover the \$700, although the land and other building may be a sufficient security as between him and the purchaser for that sum, but it does not carry the law any further in his favour.

It was the case of an insurance upon property effected by the owner, followed by a dealing which was treated as equivalent to a contract for sale, and a fire happening before payment of any part of the purchase money. The policy covered, as it properly would under the circumstances, the entire interest in the property, and because he had neither conveyed away the property nor been paid his purchase money, the plaintiff was held entitled to recover. The Court left open the question, afterwards settled in *Castellain v. Preston* (1883), 11 Q. B. D. 380, as to the rights of the parties when the assured received more than what covered his loss.

In *Rayner v. Preston* (1881), 18 Ch. D. 1, it was held that a purchaser was not as against his vendor entitled to the benefit of moneys received by the latter under a policy of insurance effected on the premises before the making of the contract.

But in *Castellain v. Preston*, it was held that the insurance company was entitled to recover back all the defendants had received beyond what was required to indemnify them against personal loss.

In *Gill v. Canada Fire and Marine Insurance Co.* (1882), 1 O. R. 341, which more nearly resembles this case, Boyd, C., held the plaintiff entitled to recover the full amount on two grounds: (1) that his interest remained the same until the happening of the fire, and (2) that the contract of sale had been annulled before the fire, and so the measure of indemnity was not changed.

The alleged agreement between the plaintiff Keefer, and his purchaser, that the former was to maintain an insurance upon the buildings for the latter's benefit cannot have the effect of making a different contract for the defendants, who neither directly nor indirectly agreed to insure any person except the plaintiff. And it seems too late now to contend that a contract to insure is other than a personal agreement with the person insuring.

The case of *Parcell v. Grosser* (1885), 1 Atl. Rep. 909, is not in my opinion of any assistance to the plaintiffs as against the defendants here, though it may be of service to the purchaser in the event of a controversy between him and the plaintiffs as to the application of the \$700 which the defendants have submitted to pay.

I am unable to agree that the defendants' undertaking in the policy to make good the loss to "the assured, his heirs or assigns," is a contract to pay the value of the buildings to Keefer's assignee of the land.

Bearing in mind the nature of the contract of insurance, and having regard to the restriction to the interests of the assured contained in the latter part of the undertaking, I think the whole should be read as an agreement to pay such sum as Keefer could properly recover to whoever may become entitled to stand in his place by operation of law, or by assignment of the policy with the defendants' consent before the loss, or with or without such consent after the loss.

Judgment.

Moss,
J.A.

Judgment.

Moss,
J.A.

The purchaser Cloy is materially interested in the question raised by the counterclaim, and I think we ought not to determine anything with respect to it in his absence, and that under the circumstances the proper disposition to make of it is to dismiss it without prejudice to any action the defendants may be advised to bring in respect of their claim to subrogation.

The appeal ought to be allowed, and the plaintiffs ordered to pay the defendants' costs of the action and appeal, and subject thereto the \$700 in Court to be paid to the plaintiffs.

LISTER, J. A. :—

I agree.

MACLENNAN, J. A. :—

The policy is dated on the 28th of March, 1894, for an insurance of \$1,700 on a frame building and additions occupied as a grocery store by a tenant, and \$300 on another building fifty feet distant from the first. The policy was issued to the plaintiff Keefer, and, on the 3rd of April afterwards the defendants, in writing, made the loss, if any, payable to the plaintiffs the Quebec Bank. The insurance was for one year, from the 23rd of February, 1894, and the premium was \$40, and by the terms of the policy the insurance was renewable annually on payment of the same premium. The policy was renewed by payment of the premium of \$40 on the 23rd of February, 1895, and 23rd of February 1896, and on the 11th of December, 1896, the principal building was burned, and it is not disputed that its value exceeded the sum of \$1,700 insured thereon. The only words in the application indicating the nature and extent of Keefer's title are these: "On the building only of his wooden building and additions, occupied by a tenant as a grocery store." There had been a previous policy on the same property by the defendants in favour of one Pattison,

described as assignee for John Cloy, loss, if any, payable to the plaintiff Keefer, as his interest might appear, and his interest, appears to have been that of a mortgagee. That policy was cancelled on the 23rd of February, 1894, the day the policy now in question went into effect. The policy insures Keefer "against all direct loss or damage by fire except as hereinafter provided," to an amount not exceeding \$2,000 on the two properties, and in a subsequent part the company's obligation is thus expressed: "to indemnify and make good unto the said assured, his heirs or assigns, all such direct loss or damage (not exceeding in amount the sum or sums insured as above specified, nor the interests of the assured in the property herein described), the amount of loss or damage to be estimated according to the actual cash value of the property, with proper deduction for depreciation however caused."

Judgment.
MACLENNAN,
J.A.

The objection made to the plaintiffs' recovery is that before the policy was effected Keefer had contracted to sell the property to one George D. Cloy, and that he was only entitled to recover \$700, the balance of purchase money which remained unpaid at the time of the fire. The defendants tendered that sum to the plaintiff Keefer before action, and paid it into Court with their defence. They also counterclaim for a right of subrogation against the purchaser Cloy for the said sum of \$700. The action was tried upon admissions signed by the solicitors of the parties, and it is there admitted that two witnesses who were then present in Court would, if called, testify on oath that at the time of the making of the contract of sale, and during the bargaining therefor, it was agreed between the plaintiff Keefer, and the purchaser George D. Cloy, that until the purchase money was fully paid the plaintiff Keefer would keep the property insured to the extent of \$2,000, and it was also in like manner agreed that the defendants had no knowledge in fact of the existence of the agreement until the 10th of December, 1896, the day before the occurrence of the fire. By the same admissions, however, the defendants objected to the admissibility of the alleged verbal

Judgment. agreement, but admitted that if it was admissible one Thos. F. Conlin, the company's local agent, was told, at the time of the application for the policy, of the existence of the plaintiff's said agreement to insure.

MACLENNAN,
J.A.

The agreement for sale had been made on the 25th of July, 1893, and was for the sum of \$2,000, payable \$300 down, \$500 in four months, and the balance in twelve months from date, with interest. The purchaser was also to pay all taxes, rates and assessments, from date of contract, and was to be permitted to occupy and enjoy the property until default in any payment of principal or interest, and time was to be of the essence. On full payment being made there was to be a conveyance, subject to a mortgage to one John Collins. The down payment of \$300 was duly made, and also the \$500 in November following, and further sums afterwards, namely, \$200 on the 5th of August, 1894, \$100 on the 9th of December, 1894, \$100 on the 13th of April, 1895, and \$100 on the 10th of August, 1895, leaving \$700 still unpaid, for which the purchaser gave his note, which is under discount, on behalf of Keefer, with the Quebec Bank.

The question is whether, under all these circumstances, the defendants are liable for the full amount of the loss.

There can be no doubt of the perfect fairness and honesty of the plaintiffs' claim. It is not in terms admitted that Conlin was informed of the sale to Cloy when Keefer applied to him for the insurance, but he must have been, or else what occasion or object could there be in telling him of his agreement with Cloy to keep the buildings insured to the amount of \$2,000. In the application the cash value of the main building was stated at \$2,000 and of the other \$500, and the insurance placed on them respectively was \$1,700 and \$300, for which the company have received three full annual premiums of \$40 each. The defendants have, therefore, been fully paid for the very risk which they assumed, with full knowledge on the part of their agent, if not on the part of the company itself. I am of opinion that the plaintiffs' claim is also

just and good in law, and that my learned brother Ferguson's judgment is right. I think it is clear in law that Keefer could insure the whole interest in the buildings, notwithstanding the sale; and that it is equally clear in fact that that is what he intended to do, and what he did do.

Judgment.
MACLENNAN,
J.A.

For the proposition of law I refer to *Castellain v. Preston* (1883), 11 Q. B. D., at p. 398, where Bowen, L. J., treats it as clear, and says the right to recover the whole value depends on two propositions: first, the form of the policy must be such as to enable him to recover the total value; and secondly, he must intend to insure the whole value at the time, and he adds: "When the insurance is effected he cannot recover the entire value unless he has intended to insure the entire value. A person with a limited interest may insure either for himself and to cover his own interests only, or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy. But he can only hold for so much as he has intended to insure." That was a case involving a question of subrogation, but the Lords Justices found it necessary to consider and discuss general principles of insurance law, and the above is therefore an authoritative statement of the law by the Court of Appeal in England which we ought to follow. Then we have to see whether the form of the policy suffices to enable the plaintiffs to recover the full value, or whether it is in any way limited. The insurance is \$1,700 on the full cash value of the building, which is stated to be \$2,000, and I find nothing in the policy which can in any way be construed into a limitation of the insurance to anything less than the full value. It was argued that the words, "not exceeding * * the interests of the assured in the property herein described," had that effect. I do not think so. As we have seen he could insure the whole subject, and did insure \$1,700 on the full value, and he is to recover his interests. What were his interests? He was

Judgment. interested in his own behalf, and also as trustee for Cloy. I think the words "interests of the assured" exactly fit the case. They must mean whatever interests the assured had which he was capable of insuring, and that included the interest in respect of which he was a trustee for Cloy, as well as his own beneficial interest. The other condition which the Court of Appeal held to be essential is an intention to insure the whole interest. Now that is clearly manifested by the insurance of \$1,700 on the whole cash value of \$2,000, at a time when only \$1,200 of the purchase money remained to be paid. I should have thought that alone sufficient evidence of intention. But it is further demonstrated by the parol agreement made at the time with Cloy, that he would keep the insurance up to \$2,000 until payment. That agreement is good evidence of intention, whether it was binding between the parties or not. But I agree with my brother Ferguson that it was a good collateral agreement, although not in writing. It in no respect varied from, or conflicted with, the written contract, as in *Mason v. Scott* (1875), 22 Gr. 592. I think the case resembles very closely, and is governed by, *Collingridge v. Royal Exchange Assurance Corporation* (1877), 3 Q. B. D. 173, before Mellor and Lush, JJ., which was referred to with approval in *Castellain v. Preston* (1880), 11 Q. B. D. 380, at p. 401.

I therefore think that the insurance was at its inception, and at the time of the loss, an insurance for the benefit both of Keefer and Cloy, and that being so there can be no question of subrogation.

See also a very able judgment in *Insurance Company v. Updegraff* (1853), 21 Pa. St. 513; reported also 3 Bennett's Ins. Cas. 680.

The appeal should therefore be dismissed.

Appeal allowed, MACLENNAN, J. A., dissenting.

DUEBER WATCH CASE MANUFACTURING COMPANY V.
TAGGART.

Bankruptcy and Insolvency—Assignments and Preferences—Sale of Assets—Extinguishment of Debt—Practice—Joint Debtors—Judgment—Consolidated Rules 587, 603, 605.

An assignment of the assets of a partnership was duly made pursuant to the provisions of the Assignments and Preferences Act, and the assignee, with the approval of the creditors, sold and transferred the assets to a nominee of the plaintiffs and two other creditors of the firm in consideration of the payment to the other creditors of a composition, and subject to the claims of these three creditors. The purchaser covenanted with the assignee to settle the claims of these three creditors and to indemnify him therefrom :—

Held, that the claims of these three creditors were thus made part of the purchase money, and were extinguished by the transfer of the assets.

A judgment recovered against one or more of partners or other joint debtors under Consolidated Rules 587, 603, and 605, does not prevent the plaintiff from proceeding in the same action to judgment against the other defendants.

McLeod v. Power, [1898] 2 Ch. 295, distinguished.

Judgment of MACMAHON, J., affirmed.

APPEAL by the plaintiffs from the judgment at the trial. Statement.

The action was brought to recover the amount due upon certain promissory notes and was tried at Toronto on the 22nd and 23rd of February, 1898, before MACMAHON, J., who, on the 1st of April, 1898, gave the following judgment dismissing it.

MACMAHON, J. :—

This action was commenced on the 11th of June, 1895, and is brought against the firm of Frank S. Taggart & Co., and Frank S. Taggart and Charles Campbell, the individual members comprising that firm, to recover the amount due on ten promissory notes made in 1893 by Frank S. Taggart & Co., payable to the plaintiff company.

Frank S. Taggart not having appeared to the writ, by an order of the Master in Chambers, dated the 31st of July, 1895, the plaintiffs obtained leave to sign final judgment against him, and on the 10th of September following, final

Judgment. judgment was signed against Frank S. Taggart as a member of the firm of Frank S. Taggart & Co., for the sum of \$18,805.59 and costs to be taxed.

MACMAHON,
J.

The notes sued on read "We promise to pay," and were all signed in the partnership name of "Frank S. Taggart & Co.," and Mr. Osler urged that the plaintiffs having entered judgment against Frank S. Taggart, one of the joint contractors, in respect of these joint notes of the firm, could not now proceed to judgment against the defendant Campbell, the other joint contractor.

Had the plaintiffs sued Frank S. Taggart only, and recovered judgment against him as one of several joint makers of the promissory notes sued on, it would have been a bar to an action against Campbell, the other joint contractor: see *Hammond v. Schofield*, [1891] 1 Q. B. 453; *Toronto Dental Manufacturing Co. v. McLaren* (1890), 14 P. R. 89; *Kendall v. Hamilton* (1879), 4 App. Cas. 504; *Munster v. RAILTON* (1883), 11 Q. B. D. 435; (1885), 10 App. Cas. 680. But in the present case both the joint contractors have been sued on a claim for a liquidated demand, and the plaintiff under Rule 587 may sign final judgment against the defendant who has not defended without prejudice to his right to proceed with his action against any other defendant.

A deed of composition and discharge, dated the 17th of April, 1893, was made between Frank S. Taggart and Charles A. Campbell, composing the firm of Frank S. Taggart & Co. (called the debtors) and the creditors of the said firm executing the said deed. It recites the inability of the debtors to pay the claims of their creditors in full, and that they had on the 14th of April made an assignment of their estate and effects to E. R. C. Clarkson, and that he had taken possession of the debtor's property, and that Winthrop A. Moore had agreed to purchase from the said Clarkson at and for a price or sum equal to twenty-five cents on the dollar of the unsecured claims of the said creditors against the said debtors (not exceeding the sum of \$32,548), the business, stock in trade, book

debts and other assets of every nature and kind of the debtors free and clear of and from all and every encumbrance save and except the claims of the Dueber Watch Case Manufacturing Co., The Hampden Watch Co., Messrs. Buntin, Reid & Co., and the rent and wages, and also to pay to the said Clarkson the sum of \$500 for costs of the said creditors against the debtors, in consideration of the said creditors releasing and discharging the debtors. All the creditors except the firm and the companies specially mentioned accepted the composition and executed the deed.

Judgment.
MACMAHON,
J

The Dueber Watch Co. controlled the claim of the Hampden Watch Co., and Winthrop A. Moore, as manager of the former company, had authority to represent both companies in all matters connected with the insolvent estate of Taggart & Co.

An agreement was entered into on the 11th of May, 1893, between the Dueber Watch Co., of the first part; Buntin, Reid & Co. of the second part; Winthrop A. Moore, of the third part; and Frank S. Taggart, of the fourth part. It recites the assignment of Taggart & Co. to Clarkson, and that it had been agreed between the parties thereto that the said Winthrop A. Moore should become the purchaser of the said estate and effects, as trustee, for the sum of \$8,637, to be paid by the parties of the first and third parts; and Moore agreed to hold and dispose of the same in trust, first, to pay Buntin, Reid & Co., the amount secured by three chattel mortgages, being about \$15,900 and interest, and the costs of protecting the said securities, amounting to \$1,038; second, to pay the said sum of \$8,637, the said purchase money; third, to pay the said the Dueber Watch Co., \$16,257.79, being the amount of the indebtedness of Taggart & Co. to the said company; and fourth, after payment of the said sums together with the costs and expenses, to transfer, assign and set over unto Frank S. Taggart all the rest and residue of the said estate and effects, together with the right of successorship in the said business and all the assets in the said business then subsisting.

Judgment. It is provided by the agreement that nothing therein
MACMAHON, J. contained should release or discharge or be construed as releasing or discharging any claim which the said Buntin, Reid & Co., or the Dueber Watch Co., have against the firm of Frank S. Taggart & Co., or any members thereof. And also that Frank S. Taggart, alleging that he has the sole and absolute right to use the firm name of Frank S. Taggart & Co., consents and agrees that the said business should be carried on by Winthrop A. Moore, trustee, in the name of Frank S. Taggart & Co.

By bill of sale, bearing date the same day (11th of May, 1893), Clarkson, with the assent of the inspectors of Frank S. Taggart & Co.'s estate, assigned to Moore all the estate and effects, rights and credits of Taggart & Co., for the sum of \$8,637, "subject, however, to the claims of the Dueber Watch Case Manufacturing Co., The Hampden Watch Co., and Buntin, Reid & Co." This bill of sale contains the following provisoes and conditions:—"And further this assignment is, at the option of the said Moore, his executors, administrators or assigns, to be void in case the creditors of the said firm of Frank S. Taggart & Co. shall not, and do not, execute a full release and discharge against the said firm and the members thereof, from all claims against the said firm and the members thereof. And further, that he, the said Moore, for himself, his heirs, executors and administrators, hereby covenants with the said Clarkson that he, the said Moore, his executors, administrators or assigns, will duly settle with the said the Dueber Watch Case Manufacturing Co. and the said The Hampden Watch Co., for their claims against the estate of the said Frank S. Taggart & Co., and will indemnify and save harmless the said Clarkson, his heirs, executors and administrators, from all the said claims or any part thereof."

Moore carried on the business under the name of Frank S. Taggart & Co. from the 11th of May until the 7th of October, 1893, when he sold out to Frank S. Taggart for the sum of \$25,000, for which Taggart gave his promissory notes, and a chattel mortgage was taken on the stock as collateral security for the payment of the notes.

On the 7th of October, the claim of Buntin, Reid & Co. had been reduced from about \$17,000, to \$11,459.66, and this balance Moore, by deed dated on that day, covenanted to pay to Buntin, Reid & Co. in the manner therein provided; and the Dueber Watch Co., who were parties to the deed, guaranteed the payment of the said sum; and Buntin, Reid & Co. covenanted to forthwith execute proper discharges of the chattel mortgages held by them on the stock formerly owned by Taggart & Co.

Judgment.
MACMAHON,
J.

By deed bearing date the 7th of October, 1893, Buntin, Reid & Co. released and discharged the firm of Frank S. Taggart & Co. and Frank S. Taggart from all claims and demands.

The letter from Moore to his solicitor, dated the 22nd of April, 1893, indicates the design and intention of the Dueber Watch Co. in desiring its agent, Moore, to become the purchaser of the estate and effects of Frank S. Taggart & Co. Moore says: "Mr. Taggart is here to-day, and tells me that the first meeting at the assignee's takes place Monday. In round amounts we are in with him for say a little over \$16,000, Buntin, Reid & Co. a little over \$13,000, or perhaps a gross amount between us both of \$30,000. This, with the understanding that Buntin, Reid & Co. assume and collect for a fifty-six hundred odd dollar note. The other creditors, Mr. Taggart says, will amount to \$30,000 or less, not to exceed \$30,000. This covers everything. He says he is confident that if the creditors holding this amount, \$30,000, receive twenty-five cents in cash, he has no doubt but what they will give him a discharge in full, and let him under certain conditions, which I will name hereafter, resume business, with no creditors except Buntin, Reid & Co. and ourselves, and the amount necessary to pay this twenty-five cents on the dollar to the other creditors."

[The learned Judge referred to further portions of this letter, instructing the solicitor to make an offer for the assets and to a letter from the solicitor to the assignee, and continued:]

Judgment. To carry out the offer thus made, the bill of sale from
MACMAHON, Clarkson to Moore, of the 11th of May, was executed.
J.

The contention of counsel for the plaintiffs was that Clarkson simply sold and assigned the whole of the assets of Taggart & Co. to Moore in consideration of \$8,637, and that the defendant as one of the partners of the firm of Frank S. Taggart & Co. could not question Moore's acts or conduct in the disposition he made of the estates so purchased. But that was not the transaction as contemplated or carried out. Clarkson as the assignee for the benefit of creditors, could not have disposed of the assets of the insolvent estate, and have divided the proceeds arising from the sale amongst one class of creditors. The sale of the assets was therefore made subject to the claims mentioned in the bill of sale. And it was not only upon being subject to such claims, but also upon a discharge being executed by the unsecured creditors who accepted twenty-five cents on the dollar on their claims, and upon Moore covenanting with Clarkson that he "will duly settle with the said the Dueber Watch Case Manufacturing Co. and the said the Hampden Watch Co., for their claims against the estate of the said Frank S. Taggart & Co.," which covenant constitutes part of the consideration therefor, that Clarkson executed the bill of sale.

The letter of Moore to his solicitor of the 22nd of April, 1893, shews that the assets were valued at \$45,000, and he anticipated that after paying the unsecured creditors twenty-five cents on the dollar, there would be sufficient to pay off Buntin, Reid & Co.'s mortgages, and the claims of the Dueber Watch Co., and the Hampden Watch Co. (the last two aggregating about \$16,000) in full. And it was by reason of his having this large amount of stock which he regarded as ample to pay the firms he represented their claims in full, that Moore covenanted with Clarkson that he would settle such claims. There was no source but the assets which he received under the bill of sale from Clarkson out of which those claims could be paid and settled.

Between the 11th of May and the 7th of October, during which the business was carried on by Moore in the name of Frank S. Taggart & Co., it was so carried on, according to the evidence of Moore, for the benefit of the Dueber Watch Co. On his examination for discovery Moore said:

Judgment.
MACMAHON,
J.

[The learned Judge referred to the portions of the examination bearing out this conclusion, and continued :]

When Moore sold the balance of the stock, etc., to Frank S. Taggart on the 7th of October for \$25,000, he (Moore) considered that if the sum he was realizing did not pay the claims in full the loss would be very small. And whatever form the transactions took they were carried on and conducted by Moore as the agent of and for the benefit of the Dueber Watch Co. And the notes taken from Taggart, representing the amount of the purchase money, were transferred by Moore to the Dueber Watch Co. and became their property. If I am right in my finding that Moore was the agent of the Dueber Watch Co., and that they were the owners of this stock when sold to Taggart, then Taggart's notes were received by the Dueber Watch Co. as representing the value of the stock, and in the books of the Dueber Watch Co. it has treated Frank S. Taggart as its debtor.

Immediately upon the transfer of the stock to Moore, on the 11th of May, 1893 (from which date until the 7th of October he carried on the business in the name of Frank S. Taggart & Co.), the Dueber Watch Co. opened a new account in their general ledger under the heading "F. S. Taggart Notes & Ac.," and Moore said: "The other accounts (of Frank S. Taggart & Co.) were all closed into this where there was any balance. The other accounts were balanced and carried to this account—the other accounts were closed and any balance either way was carried to this account." In fact, amongst the credits carried to this account, is the sum of \$5,406.16 received from F. S. Taggart on account of this \$25,000 purchase by him from Moore, in respect of which transaction a separate account

Judgment. had been opened in the individual ledger of the Dueber
MACMAHON, J. Watch Co., under the heading "F. S. Taggart account
'new deal'" and in which account is credited the sums
paid at various times by Taggart on the notes given
by Taggart for the \$25,000 purchase, shewing that the
sale of the stock to Taggart was made on account
of and for the Dueber Watch Co., else it would not have
appeared in their books as a "new deal" with Frank S.
Taggart.

From Moore's letter to his solicitor of the 22nd of April, 1893, it was the desire and intention of the Dueber Watch Co. that Taggart should be given an opportunity to resume business "with no creditors but Buntin, Reid & Co. and ourselves," and after the claim due Buntin, Reid & Co. had been settled by the Dueber Watch Co., and Buntin, Reid & Co. had discharged Frank S. Taggart & Co. and Frank S. Taggart from all liability, Moore, representing the Dueber Watch Co., immediately sold the stock to Taggart, taking his notes which were transferred to the Dueber Watch Co.

There was, I think, a clear novation of the claim of the Dueber Watch Co., they accepting the liability of Frank S. Taggart for the claims they had against the firm of Frank S. Taggart & Co., and accepting his notes and a chattel mortgage as collateral security thereto, for an amount which it was thought was sufficient to liquidate the claim of the Dueber Watch Co. against the firm of Frank S. Taggart & Co.

There must be judgment for the defendant dismissing the action with costs.

The plaintiffs appealed and the appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 20th of January, 1899.

Charles Millar, for the appellants.

Osler, Q.C., and *J. A. Mills*, for the respondent.

May 9th, 1899. OSLER, J.A.:—

Judgment.

OSLER,
J.A.

This is an action against the firm of Frank S. Taggart & Co., and against Frank S. Taggart and Charles Campbell, the individual partners who composed it, upon ten promissory notes for various sums made by the defendants in the partnership name in favour of the plaintiffs.

The action was commenced on the 11th of June, 1895, by writ specially endorsed.

On the 10th of September, 1895, final judgment was signed in the action against the defendant Taggart, pursuant to order made under former Consolidated Rule 739 and reference thereunder by consent for the purpose of ascertaining the amount due. A similar order was afterwards made by Robertson, J., against the defendant Campbell, but on appeal, by order dated the 20th of December, 1895, that defendant was let in to defend the action and to plead as he might be advised.

The statement of claim was delivered on the 21st of December, apparently against both defendants, taking no notice of the judgment which had been already recovered against Taggart. Campbell's defence was delivered on the 28th of December, 1895. The case came on to be tried before MacMahon, J., on the 22nd of February, 1898, when the facts relied upon in the statement of defence were found to have been proved, and the action was dismissed and judgment directed to be entered for the defendant.

The facts of the case are so fully and accurately set forth in the judgment of the learned trial Judge that I do not think it necessary to repeat them at length. It may, however, be briefly stated that prior to the 14th of April, 1893, Frank S. Taggart & Co. had been carrying on in Toronto a general watchmakers and jewellers' business, and were also dealers in guns, rifles, bicycles and sporting goods. On that day they made an assignment under the Act for the benefit of their creditors to Clarkson.

Their largest creditors were the plaintiffs, the Hampden Watch Co., and Buntin, Reid & Co. The claim of the

Judgment.

OSLER,
J.A.

Hampden Watch Co., was controlled or had been acquired by the plaintiffs.

Taggart was the partner in whom the plaintiffs had confidence and whom they regarded as the business man of the firm, and he procured the plaintiffs without delay to interest themselves in arranging a settlement with the creditors of the firm, and re-establishing him in a business to be carried on under the old firm name.

The result of his negotiations with the plaintiffs, who were represented throughout by one Winthrop A. Moore, their secretary-treasurer and general business manager, was that a sum of \$8,637 was agreed to be advanced by the plaintiffs for the purpose of paying a composition of twenty-five cents on the dollar to all the creditors who should execute a deed of composition and discharge, and who were to be all the creditors except the three I have named, and the assignee was to convey and assign the whole estate to Moore as trustee subject to the claims of these three.

A deed of composition and discharge, bearing date the 27th of April, between the debtors and the creditors who executed the same, who were all their creditors except the three in question, was duly completed. And on the 11th of May following, Clarkson, with the approval of the inspectors of the estate, conveyed and assigned to Moore, who is therein described as trustee, the whole of the assets of the estate in his hands.

Campbell is a party to the deed of composition and discharge, though he does not execute it. It is recited therein that Moore has agreed to purchase from Clarkson the assets of the estate at a price equal to twenty-five cents on the dollar on the unsecured claims of creditors not exceeding \$32,548, free and clear from all encumbrances save and except the claims of the Dueber Watch Case Manufacturing Co., the Hampden Watch Co., and Buntin, Reid & Co.

The defendant contends that he is discharged from all liability to the plaintiffs either by the circumstances under

which they or their trustee acquired the estate of himself and his former partner Taggart and the manner in which they have dealt with it, or that a novation has taken place whereby the plaintiffs have discharged him and have taken Taggart alone as their debtor in respect of the former partnership debt.

The learned trial Judge treated the case as one of novation and dismissed the action on that ground.

There is, I think, much reason in the contention that the debts of the three preferred creditors, as I will call them, were, so far as the defendant Campbell is concerned, discharged by the transfer of the assets of the estate to Moore, who was the agent and trustee of these creditors duly authorized to buy them.

The assignee held the estate for the benefit of the assignor's creditors generally, these three creditors among the rest, his duty being to sell and dispose of it for the best price, apply the proceeds in payment of the debts and expenses, and hand over the balance, if any, to the debtors whose estate it was. He sold it to Moore, with the sanction, no doubt, of the inspectors, for a sum which would pay all the creditors, except the three I have named, a composition of twenty-five cents on the dollar, on receipt of which they gave the debtors a release and discharge of their debts. For that sum these three creditors acquired an estate supposed by them to be of sufficient value to leave a margin of about \$10,000 over and above the purchase money and the amount of their claims in full; and it is not shewn to have been then of a less value.

The sale was expressly made subject to these claims, and Moore covenanted with Clarkson to settle with the creditors therefor and to indemnify him against all claims by them. He did in fact afterwards pay that of Buntin, Reid & Co. in full.

The sale was, in truth, a sale to the three creditors. Moore merely acted as their trustee for the sake of convenience. He by no means, as they now contend, stood simply in Clarkson's shoes. It was a sale out and out, at

Judgment.

OSLER,
J.A.

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OSLER,
J.A.

all events as regards Campbell and the assignee; and, so far as they knew, whatever may have been the arrangement between Taggart and the plaintiffs, the creditors acquired the estate to do what they liked with, free from all further interest of the debtors therein, or right on their part to have an account of Moore's dealings with it. I do not see what other reasonable meaning can be taken out of the language of the assignment by Clarkson and of Moore's covenant with him contained therein.

In Clarkson's hands the estate was a fund for payment of all the debts, including those of the three creditors in question. They bought it subject to these debts, and their trustee covenanted with him to settle with them therefor. If Campbell had no right to compel them to account for their dealings with it, that seems to me to shew that his personal liability to the plaintiffs was discharged. They had "taken the beast for the damage." Had the estate been sold to a third person not a creditor with the assent of these three creditors, but subject to their claims, the purchaser would have been obliged to satisfy these claims to the full extent of the value of the goods. The plaintiffs are in a similar situation, or rather in a less advantageous one, their trustee having bought for them the debtor's estate from his trustee, not merely on those terms, but having also covenanted with him to settle with the plaintiffs therefor. They cannot, therefore, assert as against him that their claims are still outstanding.

The private agreement of the 11th of May, 1893, made prior to the bill of sale from Clarkson to Moore of the same date, strongly supports the defendant Campbell's right to insist on this position. That agreement was made between these plaintiffs, Buntin, Reid & Co., their trustee Moore, and the defendant Taggart. Campbell is not a party to it, and the evidence does not disclose that he had notice of it. It shews that he was not intended to have any interest in the property and that the plaintiffs and Taggart meant to ignore him after Moore had acquired it. It provides that Moore is to become the purchaser for

\$8,637, to be paid by the plaintiffs and Moore (really by the plaintiffs alone), and that the trusts upon which Moore is to hold it are to pay (1) Buntin, Reid & Co. the amount of their claim as specified; (2) the amount advanced for purchase money; (3) the plaintiffs' claim as specified; and (4) after payment of these amounts and the costs of administering the estate, to transfer all the rest and residue to the defendant Taggart, "together with the right of successorship in the business, and all the assets of the business then subsisting."

Judgment.

OSLER,
J.A.

On the ground, therefore, that the plaintiffs took the property of the debtors in discharge of their debt as against the defendant Campbell, at all events under the circumstances I have mentioned, I think that defendant is entitled to succeed.

I also agree with the learned trial Judge that a novation of the debt has taken place, and that they are shewn to have accepted Taggart as their debtor in lieu of the firm.

After the assets of the estate had been conveyed to Moore he, as trustee for the three creditors, carried on the business with Taggart as manager from that time until the month of October, 1893. The plaintiffs opened a new account with Taggart, carrying into it the balance due from the old firm and supplying goods for the purpose of the business; and in that month, after paying off Buntin, Reid & Co. in full and obtaining a formal discharge of their claim, they sold the whole of the estate as then subsisting to Taggart for the sum of \$25,000, for which they took his notes and a chattel mortgage on the stock. This appears to me to be evidence sufficient to warrant the finding of the learned Judge that a novation had taken place, and that the plaintiffs had accepted Taggart alone as their debtor and discharged his partner, the defendant Campbell, against whom they made no claim until they issued the writ in this action in June, 1895, after Taggart had failed to carry on the business successfully. They dealt with Taggart in thus taking security from him as the sole owner of the property, treat-

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OSLER,
J.A.

ing Campbell as having no interest in it, and looked to him as such owner for payment of their claim. If they then had any rights against the defendant Campbell as a member of the former firm of F. S. Taggart & Co., they did not reserve them, and he is, in my opinion, discharged. I refer to Lindley on Partnership, 6th ed., p. 260 (5).

It was contended on behalf of the defendant Campbell that recovery of judgment in this action against the defendant Taggart also operated as a discharge of the plaintiffs' demand, if he were still to be regarded as a joint debtor therefor. No such effect, however, can be attributed to a judgment recovered against one of the partners on a motion for judgment on summary application, under Rule 603 (formerly Rule 739), or on judgment taken under Rule 587: *Weall v. James* (1893), 68 L. T. N. S. 515; Con. Rule 605. In *McLeod v. Power*, [1898] 2 Ch. 295, the judgment which the plaintiff took against one of the debtors, which was held to have the effect of discharging the other, was a consent judgment, not within the Rules corresponding to our Rules above mentioned.

On the other grounds which I have mentioned, the appeal should, however, be dismissed with costs.

MACLENNAN, J.A. :—

I am of opinion that the appeal cannot succeed.

The facts are stated with great fulness in the judgment of my brother MacMahon, and in the main I agree with his reasoning.

I think the deed of sale of the 11th of May, 1893, by the assignee to Moore, and the subsequent dealings of Moore with the estate of the debtors, had the effect of discharging the defendant Campbell from the promissory notes sued upon.

The debtors had made an assignment of their estate to the assignee Clarkson, under the Act relating to assignments by insolvent debtors, R. S. O. (1887) ch. 124, and it was made with the consent of creditors; and the sale to

Moore was made with the assent and approval of the inspectors of the estate and of the creditors, and it was a sale of the whole estate. The deed recites that it is made for the sum of \$8,637, and subject to the claims of the present plaintiffs, and two other companies, viz., the Hampden Watch Co. and Buntin, Reid & Co. Both the grant and the *habendum* are expressed to be subject to the same claims. The assignee covenants for title against his own acts and for further assurance. The deed was to become inoperative at the option of the purchaser in case the creditors should not execute a full release and discharge of the firm of Taggart & Co. (the debtors), and the members thereof, from all claims against the firm or the members; and finally the purchaser covenanted with the assignee Clarkson to settle with the plaintiffs and the other two companies to whose claims the sale and conveyance were subject; and to indemnify and save him harmless therefrom, and from every part thereof. Moore was the secretary-treasurer, and also the manager, of the plaintiffs' company, and in everything he did he represented and acted for them and on their behalf. This letter of the 22nd of April makes that clear, as also the evidence of Dueber. Moore estimated the debtors' stock to be worth \$45,000, the debt due to the plaintiffs and the Hampden Co. about \$16,000 and to Buntin, Reid & Co. about \$13,000 or about \$30,000 to the three companies. All the other debts amounted to about \$32,548. Simultaneously with the sale to Moore, a deed of composition and discharge at twenty-five cents on the dollar was made with and by all those other creditors, and the \$8,637, the money consideration mentioned in the deed of sale, was applied by the assignee Clarkson in paying the composition, and all those other creditors were settled with.

The sale, therefore, was a sale of an estate of a value of about \$45,000 for approximately \$38,637 made up of \$8,637 cash, and the three claims, subject to which it was made, and which Moore covenanted to settle, and

Judgment. against which he agreed to indemnify and save harmless
MACLENNAN, the assignee. Now in that transaction Clarkson was
J.A. acting as a trustee, with the full knowledge of Moore. He was a trustee, not only for the creditors, but also for the debtors. It was the estate of the debtors he was dealing with, and they became and were entitled to the benefit of the sale which he made, and to the benefit of all its terms. One of these terms was the covenant made by Moore to settle with the plaintiffs and the other two creditors, the Hampden Watch Co. and Buntin, Reid & Co. The effect would have been the same in the absence of the covenant. The moment the assignment for creditors was made, it gave to every creditor a claim upon the goods, proportioned to his debt, and when, in such a case, a sale is made, not for the full value of the estate, but for its value less the amount of one or more of the claims and subject to them, these claims become, as is well settled, a part of the purchase money, and must be paid by the purchaser. That is the effect of this deed. An estate worth \$45,000 is sold for \$8,637, subject to three claims amounting to \$30,000 more or thereabouts. That means, quite irrespective of the covenant, that the purchaser must pay the claims. Now this estate not having been Clarkson's own property, but the property of the debtors, and the claims which the purchaser had thus become bound to pay being the debts of those debtors, the defendant Campbell as one of them had a clear equity to compel the purchaser to pay them off, as part of the purchase money of the goods of his firm. It is *a fortiori* in this case by reason of the express covenant of the purchaser with Clarkson.

It may be said, however, that although Moore was the manager and the secretary-treasurer of the plaintiffs' company, and that although he may be liable to pay, that liability does not affect the plaintiffs. I do not think that makes any difference. The evidence is clear that Moore made the purchase as representing, and for, the plaintiffs, either as their agent or trustee or both. The deed itself describes

him as a trustee, not saying for whom, and it was either for the plaintiffs alone, or for them and the other two creditor companies, and whichever it was the effect is the same, as regards the plaintiffs' debt. Whether alone or jointly with the others, the plaintiffs bought the property subject to their own debt, the effect of which in equity was that it was thereby extinguished.

Judgment.
MACLENNAN,
J.A.

I think the defence might be rested on what I have already said, but when the other documents which are in evidence and the subsequent acts of the plaintiffs are regarded, the case becomes still more clear.

On the same day on which the deed of sale was made, another deed was executed between the plaintiffs, Buntin, Reid & Co., Moore, and Taggart, the latter being one of the debtors, partner of the defendant Campbell. They agree that Moore shall become the purchaser of the estate for \$8,637, to be paid by the plaintiffs and Moore; that Moore shall hold the estate upon certain trusts for sale, the proceeds to be applied after deducting expenses, first, in paying Buntin, Reid & Co. their debt, interest and costs; secondly, in repaying the \$8,637 paid to the assignee; thirdly, the debt due to the plaintiffs (which the evidence shews included that due to the Hampden Watch Co.); and fourthly, to transfer the surplus to Taggart. This deed provides for no benefit whatever for the purchaser Moore personally, and makes it clear, if it were otherwise doubtful, that the plaintiffs were the real purchasers of the estate, either alone or jointly with others, and that they were the persons who thereby became bound to settle their own debt as part of the consideration for the sale, and who bound themselves by covenant with the assignee to do so.

It was contended that the deed of sale stipulates that the rights of the plaintiffs should not be affected thereby, and that the plaintiffs had expressly refused to release the defendant Campbell, although requested so to do. I do not think, however, that these circumstances help the plaintiffs. Campbell was not a party personally to the

Judgment. deed of sale, and cannot be prevented by any stipulation therein from claiming the benefit which its necessary operation conferred upon him. Nor, if the effect of the deed was to extinguish his debt, can it affect the matter that he asked for and was refused a formal release.

MACLENNAN,
J.A.

In my judgment the appeal should be dismissed.

Moss, J.A. :—

I agree that the appeal should be dismissed.

The plaintiffs' position, that the only consideration for the transfer of the partnership assets and effects to Moore was the advance of \$8,637, I consider untenable upon the evidence.

It is quite apparent that Clarkson would not have agreed to the arrangement to which he was a party if the sole terms were that he was to hand over the trust property upon receiving a sum sufficient to cover a payment to the creditors, other than the plaintiffs and Buntin, Reid & Co., of a composition of twenty-five cents on the dollar and his own expenses.

The whole scope of the arrangement was that the plaintiffs were to take the property over, assuming and settling the claim of Buntin, Reid & Co., and taking chances of themselves getting out without loss, which they expected they would be able to accomplish by means of the arrangement with Taggart for carrying on the business.

They agreed to take the trust property, which had been placed in Clarkson's hands by Taggart and Campbell for the benefit of the partnership creditors, and, having settled with the other creditors, dealt with it as their own and in their own way.

They finally made a sale of it for the sum of \$25,000, a price fixed by themselves after being informed by Taggart, to whom they sold, that it was worth \$30,000.

I think the result of these dealings has been that Campbell is now relieved from liability in respect of the partnership debts owing to the plaintiffs at the date of the assignment to Clarkson.

I do not think it was competent for the plaintiffs in carrying out a transaction of this nature, without Campbell's knowledge or assent, to preserve his liability, or their recourse against him, in like manner as a creditor may preserve his remedies against a surety for his debtor.

Campbell's position was not that of a surety. He was a joint debtor with Taggart, and it is surely not open to argument that however willing Taggart might be to accept any terms the plaintiffs saw fit to impose upon him, he was not competent after dissolution to agree to preservation of liability as against the firm, especially upon a transaction by which the firm's assets were handed over exclusively to him.

BURTON, C.J.O., and LISTER, J.A., concurred.

Appeal dismissed.

R. S. C.

IN RE TOWNSHIP OF RALEIGH AND TOWNSHIP OF HARWICH.

Drainage—Outlet—Drainage Act, 1894, sec. 75.

A drainage scheme under section 75 of the Drainage Act, 1894, cannot be upheld if the engineer does not make provision for a sufficient outlet for the water dealt with.

Judgment of the Drainage Referee reversed.

APPEAL by the township of Raleigh from the judgment of the Drainage Referee.

The question involved was the validity of a scheme, initiated by the township of Harwich, for the repair and improvement of the Lock drain in the township of Harwich and the Gregory drain in the township of Raleigh, and the Drainage Referee upheld the engineer's report.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 17th and 18th of January, 1899.

Judgment.
Moss,
J.A.

Statement.

Judgment.

BURTON,
C.J.O.

Aylesworth, Q.C., and *J. B. Rankin*, for the appellants.
Mathew Wilson, Q.C., for the respondents.

May 9th, 1899. BURTON, C.J.O.:—

On the application to the council of the township of Harwich on the part of two ratepayers, whose lands were damaged by reason of the Lock and Gregory drains being out of repair, a resolution was passed ordering them to be put in repair with sufficient outlet, and that the engineer be appointed and instructed to make the necessary examination, prepare plans, specifications and estimates, and report at the next meeting.

That instruction, however, the engineer refused to follow, because he felt that the water could not be carried to a sufficient outlet, and at the next meeting of council those words were struck out, and the engineer was instructed merely to repair the drains in question and to make the necessary survey and to prepare plans, specifications and report.

If those instructions had been adhered to, we should probably never have heard of this difficulty, but the scheme proposed contemplated not merely repairs, but a considerable enlargement of the works, whereby a much larger body of water would necessarily be carried down and *ex concessis* would not find a sufficient outlet, but would be admittedly insufficient as long as the culvert at the railway remained at its present width.

The engineer admitted that the enlargement of that culvert formed part of his scheme, although he admits that that could only be secured by agreement with the railway, of which he saw no immediate prospect; but, as I understand his evidence, he went far beyond that. He, in answer to a question whether, under his scheme now in question, the Gregory drain could ever have a sufficient outlet as long as the culvert was there, replied "Or any other scheme."

The learned Referee, from whose decision this is an appeal, delivered no formal judgment, but placed his deci-

sion mainly on the ground that the appellants were estopped from impeaching this scheme. I am unable to take that view, but one of the grounds for allowing an appeal from the engineer's report under section 63, is that the scheme does not provide for a sufficient outlet, and upon that short ground I think the appeal should be allowed.

Judgment.

BURTON,
C.J.O.

OSLER, J.A. :—

The point on which, in my opinion, this appeal turns is a simple one, namely, whether the engineer was bound to provide a sufficient outlet for the waters, which, by means of the works he recommended upon the drains in question, would be brought down and discharged in the township of Raleigh into the Indian Creek drain. Many other questions were raised and argued, which may be passed over as having no bearing upon the real point in controversy.

The drainage system of the area may be briefly described :

Harwich is the upper and Raleigh the lower township. The course of the Lock drain is in a north-westerly direction from a point between lots 22 and 23 in the 2nd concession, W. C. R., of the township of Harwich, to the north-west corner of lot 27 in the 3rd concession, W. C. R., of that township, where it discharges after crossing the town-line between Harwich and Raleigh, into the Gregory drain in the latter township. It receives at its upper or southern end the waters of the Cameron and Walker drains. The Gregory drain commences at the lower end of the Lock drain, runs in a northerly direction through Raleigh, receiving in its course the waters of other Harwich drains, and discharges into Indian Creek drain at the junction of the latter with the Mud Creek drain on the north side of the concession road between the 3rd and 2nd concessions of Raleigh at lot 24 in the 2nd concession. Mud Creek drain runs in a southerly and then easterly direction through lots 22 and 23 in the 2nd concession of Raleigh, and along the north side of the con-

Judgment. cession road to the Indian Creek drain. The latter passes
OSLER, easterly through lot 24, concession 2, Raleigh, and lots
J.A. 1, 2 and 3 in the 2nd concession of Harwich (now
within the city of Chatham), and after crossing the con-
cession road between the 2nd and 3rd concessions of
Harwich (a continuation of the concession road already
mentioned between the corresponding concessions of
Raleigh), at lot 3, and passing through a culvert under the
Erie and Huron Railway, discharges into McGregor Creek
at a point in lot 3 in the 3rd concession of Harwich just
mentioned.

The Walker, Lock and Gregory drains, though constructed under different by-laws and at different times, thus form in fact one continuous drain running in a northerly direction. Mud Creek drain and Indian Creek drain in a similar way form a continuous drain, receiving at one point in its course the waters of the former, and McGregor Creek is therefore the only outlet for them all.

On the application of two ratepayers of Harwich the council of that township, on the 9th of March, 1897, passed a resolution appointing an engineer to make the necessary examination and report for the purpose of having the Lock and Gregory drains repaired "with sufficient outlet." This resolution was rescinded on the 12th of April, and another was passed by which the engineer's instructions were limited to making a report upon "repair" of the drains only.

On the 13th of July, 1897, the engineer reported that he had made an examination and survey, and prepared plans and specifications with estimates of cost, with a view to the repairs and improvements of the drains, in this latter respect going beyond the resolution of the council; that he found them out of repair and needing improvement to relieve lands from overflow along their course, and he recommended that they be made to conform to the data furnished on the profile accompanying the report, the drains to be in the course of the old drains, excepting that angles and projections should be dressed off to straighten the drains

with easier curves, etc. "The work is continued in the natural flow of the water to the head of Indian Creek drain, now undergoing improvement, which is designed as a sufficient outlet save for the back flow from the river (Thames), which cannot be remedied."

Judgment.

OSLER,
J.A.

The proceedings were taken, as it was admitted on the argument, under section 75 of the Drainage Act of 1894, which provides for "repairing upon report" without petition. We have held that one township has jurisdiction under this section to undertake such a work as this, dealing with connected drains in its own and an adjoining township: *In re Stonehouse and Plympton* (1897), 24 A. R. 416.

The appeal to the Referee was brought on the 15th of September, 1897, under section 63 of the Drainage Act of 1894, substantially on the ground that the engineer's scheme did not provide for a sufficient outlet. In November, 1897, the appeal was dismissed.

The object of the present proceeding is to restrain the council of Harwich from adopting the engineer's report. We are not dealing with a scheme which has been adopted by the council, and which they have passed a by-law to carry out. I do not think it appears that they have even as yet passed the provisional by-law. The question is raised, at the proper time for doing so, of the justice and propriety of the proposed scheme. With questions of compensation and damage, as they have not yet arisen, we have nothing to do, further than this that we see that the engineer has made no provision for matters of that kind in his report, and that if the proposed scheme is one, the carrying out of which seems likely to do considerable injury to landowners, who, according to the contention of some, may thus be driven to the Court of Revision to put their claims forward there to the extent at least of their assessment, that may form a reason against its adoption.

When an extensive scheme is proposed to be undertaken by one township, involving work, not merely of repair but repair and improvement, to be done by them in an adjoin-

Judgment.
OSLER,
J.A.

ing township, the onus of supporting the scheme is cast largely upon the township which propounds it. It is bound to make out that it is reasonably necessary, and that it is, so far as it can be made so, complete in itself, and one which is not likely to involve the initiation of a new work by the latter township in order to relieve itself from the waters which the other will bring down upon it.

The 75th section confers ample power upon the engineer to deal with the subject of outlet. He may provide for a new outlet or otherwise improve, extend, or alter the existing work, including, of course, the improvement of an existing outlet.

It was urged by Mr. Wilson that the engineer was not bound to provide a sufficient outlet, that the language of section 59 and other relative sections was facultative or permissive merely, and that any injury done to lands on which water might be discharged was matter for compensation.

It is not necessary to decide this point. My present impression is against it. Even where a sufficient outlet is provided claims for compensation will arise, and it seems unreasonable for the initiating municipality to provide a scheme which will result in discharging the water upon its neighbours, leaving them to get rid of it as best they can. At the present stage of the proceedings the objection to a drainage scheme on the ground that it provides no proper or sufficient outlet appears to me to be a good objection, and I think the effect of sec. 63, sub-sec. 2 (a) (2), is to make it a statutory one.

I have attentively perused the evidence taken before the learned Referee. I think it shews that the contemplated repairs and improvements will effect a considerable change in the original carrying capacity of the Lock and Gregory drains as regard both the quantity of water brought down to the point of discharge into the Indian Creek drain and the velocity of the discharge. Whatever may be said as to that drain being a continuation of the former two it appears erroneous so to describe the Mud

Creek drain which enters the Indian Creek drain at its upper end, and receives, or should receive, none of their waters, which should pass away with the waters coming from the Mud Creek drain down the Indian Creek drain, and unless the latter is sufficient to take these waters to McGregor Creek it seems inevitable that they must overflow at the junction with Indian Creek drain or diminish the capacity of the Mud Creek drain by backing up the waters which ought otherwise to pass away through it, and thus cause them to overflow the flats between the Thames and the head of the last mentioned drain. A considerably larger body of water would thus be discharged over that area than it would otherwise be subject to, the latter being what the engineer in his report speaks of as "the back flow from the river which cannot be remedied." If it cannot be remedied it at least ought not to be made worse. Is it then clear that the Indian Creek drain is a sufficient outlet? The engineer's report does not so declare it. He says it is "designed as a sufficient outlet," and when his evidence is read it is easy to understand why he has expressed himself so carefully. He refused to act upon the first resolution of the council by which he was instructed to repair "with sufficient outlet" because of the difficulty of doing so or because it would have involved a larger or more expensive scheme than the council would willingly undertake, and then the second resolution was passed instructing him simply to report as to a scheme for "repair" and leaving the outlet to take care of itself, or assuming that the repairs which were then in course of construction on Mud Creek and Indian Creek drains, under the Raleigh by-law of 1895-6, to be presently mentioned, would make the latter a sufficient outlet. This change in the engineer's instructions is to my mind very significant, as shewing that no effective outlet was intended to be provided by the present scheme, if the works on the Mud and Indian Creek drains were not sufficient for the purpose. Then, were they so? They were being made under a by-law of the appellant

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OSLER,
J.A.

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OSLER,
J. A.

township passed in 1895 "to enlarge and improve Indian Creek drain as an outlet drain," adopting a report of the same engineer whose report is now in question. He says: "It was for Mud Creek that I did all my work in Indian Creek. I had no instructions to make one solitary inch of capacity for the Gregory Creek or any other creek or drain." It is far from being proved that any such scheme as the present was contemplated when that by-law was passed by Raleigh, or that the work authorized thereby was intended as an outlet for waters which might be brought down by the drains, as Harwich now proposes to repair and improve them, viz., by widening and deepening them in some parts of their course. That it would to some extent afford an improved outlet was probable, but that cannot justify a scheme which (as is also at least probable) will bring down waters which will exceed the capacity of such improved outlet to discharge.

There is also the difficulty which has arisen in the execution of the works under the Raleigh by-law in consequence of the culvert under the Huron and Erie Railway being of smaller capacity than was contemplated by the report of the engineer, although even if an agreement could have been made with the railway company, pursuant to section 85, for its being constructed of the full dimensions which were originally intended, the objection to the present scheme would still have existed. I am unable to agree with the learned Referee that Raleigh is estopped by reason of the by-law of 1895 from objecting to the scheme now proposed by Harwich and therefore am of opinion that the appeal should be allowed. This may result in the parties being obliged to adopt a thorough and more costly scheme—coming to an agreement with the railway and improving the outlet into McGregor Creek, or accepting the compromise upon the lines suggested by the appellants, which, it is said, appear in another report of the engineer.

But, however this may be, I think that the objection of the township of Raleigh to the present scheme should be

entertained and their appeal allowed. There is nothing to prevent each township from repairing its own drain to its original capacity or to prevent one from repairing both, if either refuses to attend to its own. But the scheme with which we are now concerned is very different from that.

Judgment.

OSLER,
J.A.

MACLENNAN, MOSS, and LISTER, JJ. A., concurred.

Appeal allowed.

R. S. C.

WOOLLEY v. VICTORIA MUTUAL FIRE INSURANCE
COMPANY.

*Insurance—Fire Insurance—Mutual Company—Assessment Note—
Default—Forfeiture.*

Default in payment of one of the deferred payments of the first instalment of a premium note given by an insurer in a mutual fire insurance company, under sec. 129 of the Act, R. S. O. ch. 203, does not *ipso facto* work a forfeiture.

A notice by the company to the insurer treating the payment as an assessment, and notifying him that in the event of nonpayment the policy would be suspended, is not an assessment under section 130, and nonpayment pursuant to the notice does not suspend the operation of the policy.

Judgment of MEREDITH, J., affirmed.

THIS was an appeal by the defendants from the judgment of the trial Judge. Statement

The action was brought upon a policy of insurance, dated the 23rd of July, 1895, issued by the defendants, who were a fire insurance company carrying on business in Ontario, insuring in the sum of \$1,600, for three years, buildings and machinery of the plaintiffs, the loss, if any, being made payable to one F. O. Martin, mortgagee, as his interest might appear. The policy did not contain any special conditions and was expressed to be in consideration of the following undertaking:—

Statement. \$387.00.

HAMILTON, July 23rd, 1895.

In consideration of policy of insurance to be issued by the Victoria Mutual Fire Insurance Company, in accordance with the Ontario Insurance Act, amendments thereto, and my application of this date, I hereby undertake to pay the said company, at their office in Hamilton, whatever assessments the directors may from time to time declare to be required, not exceeding in the whole the sum of three hundred and eighty-seven dollars.

WILLIAM WOOLLEY & SON.

A fire occurred on the 16th of September, 1897, and the loss was greater than the amount insured.

No assessments had been made upon the undertaking, but payment of \$129 was, at the time the policy was issued, directed to be made in three equal annual instalments, the first forthwith, and this was paid, the second at the end of the first year, and this also was paid, and the third at the end of the second year. At the end of the second year the following notice was sent by the company to the assured:—

Re policy No. 12034.

Mailed at Hamilton, July 23rd, 1897.

MESS. W. WOOLLEY & SON, City.

Dear Sir,—I beg to notify you that in accordance with the insurance laws of Ontario, the Board of Directors of the Victoria Mutual Fire Insurance Company of Canada, have directed payment of policy, numbered as above, as follows:—

For the period of one year from the 23rd day of July, 1897, to the 23rd day of July, 1898, subject to the provisions of section 124, of the Ontario Act, 1887.

Amount directed as third payment, \$43.00.

The above amount, viz., \$43.00, must be paid so as to be received by the company at their office, Wentworth Chambers, corner James and Main streets, Hamilton, in 30 days from the mailing of this notice.

W. R. STUART, *Secretary*.

N.B.—Should this assessment not be paid within 30 days after it has become due, the company will not be liable for the payment of any loss that may occur while it remains unpaid. Statement.

The payment was not made within thirty days and had not been made when the fire occurred.

At the time of the fire there was due to Martin about \$1,300, and part of this sum he received from insurance on other property. The defendants paid his claim, and took an assignment of his mortgage to a trustee. In this action the plaintiffs claimed payment of \$1,600 and interest, or, in the alternative, a discharge of the mortgage and payment of the difference between \$1,600 and the amount paid to Martin.

The action was tried at Hamilton on the 21st of April, 1898, before MEREDITH, J., who, on the 30th of May, 1898, gave the following judgment:—

MEREDITH, J.:—

The defence to this action is based entirely upon the fact that the third instalment of the first payment of the premium was not paid, nor tendered, before the loss.

But, in my opinion, that defence fails for want of proof that such nonpayment caused a forfeiture of the insurance.

The policy is for three years, and contains no such provision.

The contention for the defendants is, that the 129th section of "The Ontario Insurance Act," R. S. O. ch. 203, has that effect. The defendants admit that they must sustain their defence under it, or fail; they do not rely upon any other enactment, or upon anything contained in, or endorsed upon, the policy.

The policy in question is one made upon the plan authorized by that section, and the portion of the section relied upon is in these words:—

Judgment.

MEREDITH,
J.

“ Provided that nonpayment of any of the fixed payments subsequent to the first shall not forfeit the insurance unless thirty days’ notice of the fixed payment due, or to become due, has been mailed to the person by whom the fixed payment is payable, directed to his post office address as given in his original application, or otherwise in writing to the company.”

Do these words create a forfeiture for nonpayment of the second or third of the fixed payments? I think not.

Forfeitures are not favoured, they ought to be provided for in reasonably plain words.

It seems to me that the draughtsman, in framing this proviso, had it in mind that by some other means or provision, such nonpayment would cause a forfeiture, and, in aid of the insured, intended to make provision that it should not take effect unless the thirty days’ notice of the time for payment was previously given; that instead of creating a forfeiture, the intention was, and the fair meaning of the words is, to prevent a forfeiture—elsewhere provided for—without notice.

And it may possibly be that at the time this provision was added to the then Insurance Companies Act [R. S. O. (1887) ch. 167] in 1890 [53 Vict. ch. 44, sec. 2 (O)], it could have been contended successfully that the 125th section of R. S. O. (1887) ch. 167 covered a payment of this kind, and so voided the policy for nonpayment; but if so, that section has since been so altered as to make it admittedly inapplicable now; since that amending Act (53 Vict. ch. 44, sec. 2), the assessment referred to in section 125 must be one made under section 124, and not the fixed cash in part or first payment provided for in section 123. The cash in part or first payment could not be assessed, and notice of assessment given in manner provided for in section 124. There was in fact no assessment under section 124, now 129. The defendants disavow any intention to assess, and any assessment, under that section.

Other sections of the Act, admittedly inapplicable to this case, add weight to this interpretation of that section,

for they shew that where it was intended to create a forfeiture, it was done in affirmative words so plain as to leave no room for disputation. The words of section 131 (of R. S. O. ch. 203) are: "If the assessment on the premium note or undertaking * * is not paid within thirty days after notice mailed as in section 130 enacted, the contract of insurance, for which the assessment has been made shall be null and void." And in section 167 the provision is that "the policy shall be null and void" if payment for a renewal of it is not made.

Judgment.
MEREDITH,
J.

Upon this short ground the defence fails.

There will be judgment for the plaintiffs for the proper amount of their claim, with costs of the action.

Since writing this judgment, written arguments have been handed in, which, however, throw no new light upon the matter, and call for these further observations only:—

The case is not one of a renewal of a policy; the insurance was for three years, not one year, and the consideration for such insurance was the insured's premium note or undertaking.

The 19th statutory condition is not applicable. No notice was ever given, or intended to be given, under it.

It was agreed at the trial that the one question for consideration was the validity, or invalidity, of the policy at the time of the loss, that the amount of the claim, and the plaintiffs' right otherwise to it, were not in dispute; and there was no evidence whatsoever of any claim of any mortgagee.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 16th and 17th of March, 1899.

Armour, Q.C., and *J. J. Scott*, for the appellants. The nonpayment of the third fixed payment after the expiration of thirty days from the mailing of the notice put the plaintiffs in the position they would have been in if the first fixed payment had not been made, and there

Argument. was therefore no consideration for the third year's insurance. An examination of the different sections dealing with the "cash" or first payment shews that the provision appearing as the second part of sub-sec. 2, sec. 129, R. S. O. ch. 203, is the only one which was ever in force relating to the nonpayment of a portion of the "cash" or first payment, and it is clear that the Legislature intended by the latter portion of the sub-section to provide for forfeiture of the policy for nonpayment. The nineteenth statutory condition is applicable, and the defendants were discharged from liability under the policy at the expiration of thirty days from the delivery of the notice. There was no portion of the premium to be returned, and it was not necessary to refer to the nineteenth statutory condition in the notice.

George Lynch-Staunton, and *W. L. Ross*, for the respondents. The notice given is not the notice spoken of in sec. 129 of R. S. O. ch. 203, but is that referred to in sec. 130, and it does not declare that the policy shall be forfeited, but only that the company will not be liable for any loss that may occur while it remains unpaid. If the defendants had made an assessment under section 130, and had given the notice therein required, and the plaintiffs had made default, then the question would be whether or not the provision contained in section 131, nullifying the contract, was one which should be set out in the policy in accordance with section 144, but no assessment was made, and the notice, therefore, is a nullity.

Armour, in reply.

May 9th, 1899. BURTON, C. J. O. :—

The defendants issued the policy mentioned in the pleadings on the 23rd of July, 1895, for the period of three years, on the cash mutual plan, under which they accept an undertaking for a certain sum, liable to be assessed for the losses and expenses of the company, in the manner provided under the Insurance Act.

Under this system the directors were empowered to demand in cash a part of the premium note or undertaking at the time of the issue of the policy, the residue of the note or undertaking being liable to assessments as losses might occur.

Judgment.

BURTON,
C.J.O.

In 1890 an amendment was made allowing the directors, instead of exacting a payment in cash, to make the said sum payable by annual instalments, and but for the proviso I should have thought it clear that the default in payment of the second or third instalment would not have caused a forfeiture, but that proviso clearly would have enabled the company to insist on a forfeiture if its provisions had been adhered to.

But to have that effect the directions of the statute must be strictly complied with.

All that was required was to mail to the address of the insured a notice that the instalment was due and that the company required it to be paid in thirty days or the policy would cease to be in force, but instead of this the notice untruly stated that the directors had made an assessment under section 124, and in a *nota bene* gave a notice which was quite inconsistent with a forfeiture to the effect that the company would not be liable for any loss that might occur whilst that assessment remained unpaid.

That was not the course pointed out in the statute, and it declares that there shall not be a forfeiture unless that course is adopted.

I am of opinion, therefore, that the learned Judge was right in holding that the defence, on the ground of forfeiture, failed.

A great portion of the evidence at the trial was devoted to shewing that there was an agreement between the company and the Messrs. Martin to keep the policy alive, notwithstanding the nonpayment of the premium, in their favour as representing the mortgagee, but although that evidence was given the mortgagee did not appear at the trial or make known his interest in the policy, and the defendants deny that they have paid the mortgage or any part of it.

Judgment.

BURTON,
C.J.O.,

It was admitted on the argument that the directors had accepted, in lieu of cash, one-third of the amount in cash and the remaining two-thirds payable by annual instalments, of which the instalment in default was the last, but they have treated it as an assessment and have consequently left themselves liable on the policy as they would not have been if they had adopted the course pointed out in the statute and the default still continued.

I have made no reference to R. S. O. ch. 203, as it is not the law applicable to this case.

If this decision should leave the company exposed to liability to the mortgagee they have brought it upon themselves by omitting to set up payment to him as a defence; in fact it is difficult to understand why the evidence to which I have referred was offered if the mortgagee did not intend to assert his claim to the policy money.

I think the appeal should be dismissed.

OSLER, J. A.:—

Beyond an entry in the defendants' own book there was nothing to shew that any part payment of the \$129, divided into fixed payments or instalments, had been required or demanded by the directors at the time of insuring, or that the plaintiffs had agreed to pay otherwise than as disclosed by the undertaking and the receipt presently referred to. On the back of the policy is a memo. endorsed, "Cash payment \$43," for which a receipt is produced which states that this amount is duly endorsed on the plaintiffs' undertaking, and also that it "is granted for one year's insurance from date, subject, however, to assessment if ordered by said board of directors." The next receipt is dated the 24th of December, 1896, for \$43, expressed to be for an assessment ordered by the board of directors from the 23rd of July, 1896, to the 23rd of July, 1897, with a memo. upon it similar to the last. These two payments were made by the mortgagees who subsequently recovered them from the plaintiffs.

Judgment.

OSLER,
J.A.

A third payment or instalment is said to have become due on the 23rd of July, 1897, which has never been paid.

The question is whether such a payment or instalment ever did become due, and if it did, whether its nonpayment avoids or operates as a forfeiture of the policy, or prevents the plaintiffs from recovering thereon, so long as it remains unpaid. None of the conditions of the policy touch the question, the solution of which depends upon the proper construction of those provisions of the Insurance Act which relate to it, and a consideration of what the defendants have actually done under them. I refer to the Consolidated and Revised Act of 1887, R. S. O. (1887) ch. 167, the Act of 1890 amending it, and the Act of 1897, 60 Vict. ch. 36 (O.), passed on the 13th of April, 1897, by which the existing law was then consolidated and amended. This Act, the Act of 1897, I only notice because it happens to be that which was actually in force when the third payment became due as alleged. It makes no substantial change in the law which was in force when the policy was issued in 1895, and is now found in R. S. O. ch. 203.

Section 122 of R. S. O. (1887) ch. 167 (section 127 of the Act of 1897), provides that the company may accept the premium notes or the undertaking of the assured for insurance, said notes or undertakings to be assessed for the losses and expenses of the company in the manner thereafter provided.

Section 123 (section 129 of 1897) provides that the directors may demand in cash a part or first payment of the premium or premium note or undertaking at the time that application for insurance is made, which first payment shall be credited thereon as against future assessments. Not more than 50 per cent. of the premium note is to be so paid.

In 1890, by 53 Vict. ch. 44, sec. 2 (O), this section was amended by adding a sub-section (which now appears as sub-sec. 2 of sec. 129 of 1897) as follows: "Instead of requiring the whole of the first payment to be made in cash at the time of insuring, the directors may

Judgment.

OSLER,
J.A.

make the said sum payable in annual instalments, the first of which shall be payable on the day of insuring, and the remaining instalments shall be respectively payable on the first day of each subsequent year of the term of insurance. Provided that nonpayment of any of the instalments subsequent to the first shall not forfeit the insurance unless thirty days' notice of the instalment due, or to become due, has been mailed to the person by whom the instalment is payable." In the Act of 1897 the instalments are described as "the first (or second, or as the case may be) fixed payment." In other respects the section is the same as before.

It is under these sections that the defendants contend that the policy was issued, the premium note or undertaking given, and a part or first payment of \$129 thereof fixed and demanded by the directors, divided into three annual instalments or fixed payments, payable as already mentioned.

Sections 124 to 129 (included in the group of sections following section 129 of the Act of 1897) relate to the assessments and the mode of making the same upon the premium note, the notice to be given to the insured and the consequence of default in payment. They do not relate to the "fixed payments" or instalments, which are payable absolutely and at all events, and the only provision relating to which is found in section 123, as amended by the Act of 1890 (section 129 and sub-sections of 1897). Assessments are calls which, by a special resolution of the board of directors, may be made from time to time if necessary upon the premium note during the currency of the policy for which it is given, over and above the "fixed payments" already described.

On the 23rd of July, 1897, the defendants sent the plaintiffs the following notice :

[The learned Judge read the notice and continued:]

Section 124, referred to in this notice, is, as I have said, the section of the Act of 1887 which provides for the

making of an assessment by the directors upon the premium note; and had an assessment really been made the notice itself might, I think, be regarded as such a notice of an assessment as the section provides for, and the *nota bene* states the substance of section 125 as to what will be the effect of its nonpayment.

No assessment upon the note was ever, in fact, made by the directors.

It appears to me that if this policy is to be regarded as having been made under section 123 of R. S. O. (1887) ch. 167, as amended by the Act of 1890, (the case being looked at as if there had been a part or first payment required of \$129 of the premium note of \$387, divided into three fixed payments of \$43 each,) that the section contains no clear affirmative enactment that the default in payment of the fixed payments after notice shall, *ipso facto*, work a forfeiture of the policy.

We should expect to find direct and positive language had the Legislature intended that this should be the result, independent of the form of the contract between the parties, as in cases under section 125 and elsewhere. There is no preceding enactment of which the proviso is the qualification, not a word which, but for the proviso, could be fairly construed as imposing a forfeiture in the event of nonpayment of any of the fixed payments: *Martelli v. Holloway* (1872), L. R. 5 H. L. 532, 548, 550; *Mullins v. Treasurer of Surrey* (1880), 5 Q. B. D. 170, 173. I incline, therefore, to agree with the view taken of this by the learned trial Judge, viz., that what was intended by the Act was to control any express provision or condition which the policy might contain, creating a forfeiture in the event of default, and there being no condition in the policy, or, as I read it, in the statute, no forfeiture has occurred.

I think, too, that the notice issued by the directors is not the notice intended by the amended section 123 of the fixed payment or instalment said to have been due on the 23rd of July, 1897. It expressly purports to be a notice

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

under section 124, that is to say, notice of an assessment upon a premium note or undertaking and of the penalty imposed by section 125 as the result of nonpayment, viz., suspension of the company's liability during the period of default, and there is no reason why the plaintiffs should have treated it as being anything else. If no assessment was ever in fact made, there was nothing upon which such a notice could operate, as it does not relate to the fixed payment provided for under section 123.

I am also of opinion that the defendants have failed to prove that the insurance was one under the amended section of 1890, that is to say, an insurance on which, at the time it was made, a first payment of \$129 of the whole premium note of \$387 was required, divided into three fixed payments or instalments.

The plaintiffs' contract is found in their undertaking alone, and by it they have only agreed to pay whatever assessments the directors may from time to time make thereon. At the most the only part or cash payment of the note which the directors appear to have required or demanded at the time of the insurance was \$43. All other sums which might have to be paid thereon were to be paid only as might be (and so far as they were paid or demanded they were stated to be) called up by assessment upon the premium note. There having then been in fact no assessment the notice given was ineffectual, and the plaintiffs are entitled to recover.

The defendants might have terminated the insurance under the 19th condition of the Act, but they never did so, and that condition has no application to the state of facts before us.

As to the mortgagee: The plaintiffs are the persons insured. Martin has been paid and makes no claim. And although his mortgage may have been assigned to Turner the policy was not assigned. It is in the hands of the insured, and there is no evidence that anyone else has a claim thereon.

The appeal must therefore be dismissed.

MACLENNAN, J. A. :—

Judgment.

MACLENNAN,
J.A.

The sum of \$43, mentioned in the notice, was not paid within the time named, nor at the time of the fire, which was on the 16th of September, 1897, and the defence is that by reason of such nonpayment the plaintiffs are precluded from recovering; that the policy was forfeited, or at all events suspended, during the period of default in payment. For this contention the defendants rely on section 129 of the Act (R. S. O. ch. 203) and its several sub-sections. The learned Judge has held, and I think rightly, that there was no forfeiture or suspension of the policy. By section 127 the company was authorized to accept a premium note or undertaking of the assured as the consideration for assurance, such note or undertaking to be assessed for the losses, expenses and reserve of the company as afterwards provided, and that is what they did in this case. Section 129 enables companies to proceed in a different manner. They may demand in cash a part of the undertaking at the time of application, the cash so paid to be credited upon the undertaking or against future assessments; or they may, instead of requiring the whole of the first payment to be made in cash at the time of the insurance, stipulate for payment in instalments, one payable at the time of insurance, and the others on the first day of each subsequent year. This policy is issued in the manner authorized by section 127, and not in that authorized by section 129. It is true they demanded and the plaintiffs paid a sum in cash at the time of effecting the insurance, and a further sum in the following year. But the plaintiffs' contract was expressed in the undertaking, and was to pay whatever assessments the directors might from time to time declare to be required, not exceeding \$387. The plaintiffs were entitled under the first sub-section of section 129 to have the first payment credited on the undertaking or against future assessments, and might well suppose that the second payment was an assessment; and if the directors had assessed them for the third payment then section 131

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J.A. would have come into operation, and, upon notice as provided for by section 130, the benefit of the insurance would have been suspended during the period of nonpayment; but a mere notice such as was served on the plaintiffs on the 23rd of July, 1897, is not equivalent to an assessment by the directors, as required by the plaintiffs' undertaking, and also by section 130. I therefore think that, having regard to the terms of the plaintiffs' undertaking, they were in no default at the time of the fire, and that they are entitled to recover. It was contended by the appellants that at all events the judgment should be varied by directing a deduction of the \$43, being the premium for the year 1897. But I do not see how we can do that. In the absence of an assessment there was nothing legally due for premiums, nor is there anything due now, so far as disclosed by the evidence.

It was also contended that the defendants should have some relief in respect of the Martin mortgage. But I think there is no evidence which would enable us to grant it. They deny in the defence that they have paid anything to the mortgagee, and the evidence is that the mortgagee has been satisfied, it is not shewn by whom, and then what the policy says is that "the loss, if any, is payable to F. O. Martin as his interest may appear." It was for the defendants to shew, if such be the fact, that Martin has an interest.

The appeal ought, therefore, to be dismissed.

Moss, J. A. :—

I am of the same opinion.

Appeal dismissed.

R. S. C.

FAWCETT V. FAWCETT.

Benevolent Society—Insurance—Will—Change in Rules—Creditors.

In his application for membership in a benevolent society the applicant directed that the amount to which he should be entitled should be paid "subject to my will," and the certificate, issued in 1889, provided that at the death of beneficiary, if then in good standing, "his heirs and legal representatives shall be entitled to receive the amount collected upon an assessment not exceeding \$3,000, and he now directs that in case of his death the said sum be paid subject to his will."

The insured died on the 5th of January, 1897, having on the 12th September, 1896, made his will by which he directed his debts to be paid, and gave "all the rest and residue" of his estate to his wife, who survived him. At the time of the issue of the certificate the rules of the society provided that moneys payable under a beneficiary certificate should be paid to such person as the member while living might have directed, but there was no provision as to payment in the event of an invalid appointment or of want of appointment. In July, 1896, new rules were passed limiting the persons who could take as beneficiaries and excluding expressly creditors and persons designated only by will:—

Held, that the new rules did not affect certificates then existing and that the insured's executors were entitled to the amount (fixed at \$1,500) for distribution among the insured's creditors.

Johnston v. Catholic Mutual Benevolent Association (1897), 24 A. R. 88, distinguished.

Judgment of STREET, J., affirmed.

THIS was an appeal by the plaintiff from the judgment of STREET, J. Statement.

The plaintiff was the widow of one James Fawcett, and brought the action against his executors to recover the sum of \$1,500, received by them in settlement of a claim under a beneficiary certificate issued to Fawcett by a benevolent society known as the Select Knights of Canada, incorporated under R. S. O. (1877) ch. 167.

Fawcett applied for membership in this society on the 1st of November, 1889, and by his application agreed that compliance on his part with all the laws, regulations and requirements which were, or might be thereafter, enacted by the order, was the express condition upon which he was to be entitled to participate in the beneficiary fund. The printed form of application contained a clause with a blank space in which was to be inserted the name of the proposed beneficiary, and this clause was filled in so as to

Statement. read as follows : " I make application for a \$3,000 certificate, and I hereby authorize and direct that the amount to which I may be entitled of the said beneficiary funds shall at my death be paid to subject to my will bearing relation to me of," the words "subject to my will" being written in the space.

The material portion of the certificate issued upon this application was as follows :

" This is to certify that Comrade James Fawcett is a Select Knight in good standing, of Dunnville Legion No. 36, located at Dunnville, Ontario, and at the time of his death, if he is in good standing in the Legion and in the beneficiary department, his heirs and legal representatives shall be entitled to receive the amount collected on one assessment not exceeding \$3,000, and he now directs that in case of his death, the said sum be paid 'subject to his will.' "

At the time of the issue of this certificate the rules of the association provided that moneys payable under a beneficiary certificate should be paid to such person as the member, while living, might have directed, and there was no provision as to payment in the event of no appointment, or of an invalid appointment. In July, 1896, however, new rules were passed limiting the persons who could take as beneficiaries, and expressly excluding creditors and persons designated only by will.

Fawcett died on the 5th of January, 1897, having, on the 12th of September, 1896, made the following will:—

" This is the last will and testament of me James Fawcett of the village of Dunnville, in the county of Haldimand, drover, and I hereby revoke all former wills and testaments by me at any time heretofore made, and declare this only to be my last will and testament. I direct that all my just debts, funeral and testamentary expenses be paid by my executors hereinafter named. All the rest and residue of my estate of whatever nature or kind and wheresoever situate that I may die possessed of or entitled to, I give, devise and bequeath unto my wife Cora Dell Fawcett for her own use and benefit absolutely.

I nominate, constitute and appoint my said wife Cora Dell Fawcett, Edward Fawcett and Allan Jamieson, both of the township of Moulton in the county of Haldimand, farmers, to be the executrix and executors of this my will." Statement.

The testator's wife renounced probate, and the will was proved by the defendants, who then brought an action upon the beneficiary certificate, and accepted \$1,500 in settlement thereof, the wife consenting as far as the amount was concerned.

She then brought this action, which was heard on motion for judgment on the 30th of March, 1898, by STREET, J., who decided that the moneys in question formed part of Fawcett's estate in the hands of the executors. It was shewn that Fawcett's estate was insolvent; that even with the amount in dispute there would not be nearly enough to pay his debts, and that the plaintiff under certificates in other associations made payable to her had received about \$3,500.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 23rd of November, 1898.

Aylesworth, Q.C., for the appellant. This is an attempt by the creditors of the deceased to evade the provisions of the Benevolent Societies Act, and should not be allowed to succeed. Under the rules of the society, too, the executors cannot claim. No person is named in the certificate as the beneficiary, and the appointment by will to the plaintiff takes effect: *Johnston v. Catholic Mutual Benevolent Association* (1897), 24 A. R. 88; *American Legion of Honour v. Perry* (1886), 140 Mass. 580; *Daniels v. Pratt* (1887), 143 Mass. 216; *Morgan v. Hunt* (1895), 26 O. R. 568. The new rules apply, for the deceased in his application expressly agrees to be bound by any changes. At the worst the case must be looked upon as one of intestacy, and the plaintiff is then entitled under the Devolution of

Argument. Estates Act to \$1,000 as a preferred payment, and to her distributive share of the residue.

W. E. Middleton, and *J. F. McDonald*, for the respondents. The plaintiff is not named in the certificate as the beneficiary, and has not been appointed beneficiary by the insured in his lifetime. She therefore cannot take under the certificate. If she relies on the will she is met with the difficulty that under it she is to have only the residue of the estate, and that is nothing. The direction that the money is to be paid subject to the insured's will is equivalent to a direction for payment to the insured's executors and is valid: *Rawson v. Jones* (1874), 52 Ga. 458; *Basye v. Adams* (1883), 81 Ky. 368; *Wist v. Grand Lodge* (1892), 22 Oregon 271. The new rules are intended to apply to future cases, and at any rate cannot affect pre-existing rights: *Yelland v. Yelland* (1898), 25 A. R. 91; *Dale v. Weston Lodge* (1897), 24 A. R. 351. The exemption under the Benevolent Societies Act does not apply where the insured himself makes an inconsistent disposition of the fund. At all events, if it does, the plaintiff's claim must abate in proportion to the abatement under the certificate. The amount received by the widow under the other certificates should be held to be a satisfaction of any claim under the Devolution of Estates Act.

Aylesworth, in reply.

May 9th, 1899. OSLER, J.A. :—

The plaintiff's contention is that by force of the 12th section of the Act, R. S. O. ch. 211, and of the rules of the society, she is entitled under the will to the whole of the money received by the executors, free from all claims by them or by the creditors of the deceased, and that the direction in the will as to payment of debts is inoperative as regards this fund. For the defendants it was argued that under those rules of the society, to which alone, as they contended, the certificate was subject—those, namely, in force at the date of its issue—it was a certificate which

the deceased could lawfully apply for, and the society could lawfully grant, so that he was at liberty to deal with the funds as part of his estate, and to devote it, if he pleased, to the payment of his debts ; that the plaintiff not having been named in the certificate as the person to receive the moneys payable thereunder, and the deceased not having otherwise, while living, directed that it should be paid, she could only take it subject to the terms and directions of the will.

The 12th section of the Act enacts :—" When, on the death of a member of a society, any sum of money becomes payable under the rules of the society, the same shall be paid * * to the person or persons entitled under the rules thereof, or shall be applied by the society as may be provided by such rules ; and such money shall be, to the extent of \$2,000, free from all claims by the personal representative or creditors of the deceased."

Section 5, corresponding to section 4 of a former Act, enacts that the society may, from time to time, make by-laws, rules or regulations for the government, and for conducting the affairs, of the society, and may, from time to time, alter or rescind the same.

The by-laws of the society in force when the certificate in question was granted were those of 1889.

It would seem from the forms of the application and certificate given in sections 39, 42, and 44, of the constitution and by-laws, to have been intended that the sum mentioned in the certificate should be made payable to some relative of the applicant, whose name should be specified in both instruments. But the only rule or by-law which expressly deals with the subject is section 38 : " Upon the death of a Select Knight, who is a member of the beneficiary department in good standing, such person or persons as said member may have directed while living shall be entitled to receive of the beneficiary fund, such sum as may be due under the terms of the beneficiary claim issued to the deceased. * * Provided that should the said member become totally disabled for life, so as to be unable to fol-

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low his own or any other avocation, he shall be entitled to receive, or there shall be paid to his order one-half the amount his heirs were to receive had he died that day; the remaining half to be paid at his death."

Sections 56 and 59 were referred to, but they do not enlarge the scope of section 38. Section 57 further shews that the direction as to payment must be made in the lifetime of the member. It permits him to make a new direction as to payment by authorizing such change in writing on the back of the certificate in the form prescribed, attested by the prescribed official. The "old" certificate is to be filed with the grand recorder if practicable, and a new certificate issued, bearing the same number as the "old" one. But there is no by-law which provides for the case of the member not having while living directed or appointed the beneficiary who is to be entitled at his death to receive the money secured, or for the case of his having made an invalid appointment, or an appointment not authorized by the rules of the society. Nor is there any rule (I am still speaking of the constitution of 1889), which prescribes or defines what class of persons may be appointed beneficiaries, except in so far as that may appear from section 38, and from the form of the certificate itself as given in sections 43, 44.

In the last two important particulars, viz., the absence of any provision for dealing with the fund in the event of an invalid or unauthorized appointment, and for its payment in that event to certain specified relations or next of kin, the case at bar differs from *Johnston v. Catholic Mutual Benevolent Association* (1897), 24 A. R. 88.

The plaintiff can establish no claim under the certificate itself because she is neither the heir nor legal representative of the deceased, nor a person who was appointed by the member while living to receive the fund, an appointment by will being clearly not contemplated or authorized by the rules of the society. And the certificate itself is one which the society were not, by their constitution at all events, authorized to grant, because it does not permit

them to confer upon their member, or to contract with him for, the right to dispose of the fund by his will. Whatever may have been the force and effect of the certificate as a contract with the society it is something outside the scope of the rules and the protection of the Act. The plaintiff, therefore, does not come within the 12th section of the Act as a person entitled to the proceeds of the certificate under the rules, nor are such proceeds within that section exempt from the claims of the creditors of the deceased. They are part of his general estate, having been received by his executors from the society, and the plaintiff can only claim them subject to the will.

I do not think that the provisions of the constitution of 1896 can affect the case or alter the terms of the certificate: *Yelland v. Yelland* (1898), 25 A. R. 91; *Wist v. Grand Lodge* (1892), 22 Oregon 271. Their language is, moreover, prospective, and relates to certificates to be subsequently granted. The appeal must therefore be dismissed.

MACLENNAN, J.A. :—

I am clearly of opinion that this appeal cannot succeed.

If there was nothing to be regarded but the application and the certificate it would be perfectly clear that the plaintiff could not succeed. The deceased applied to the society for membership, and its incidental benefits and advantages, promising to conform to all rules and regulations, which included the regular payment of certain dues and assessments. He was accepted as a member, received his certificate, paid his dues and assessments, and conformed to all rules and regulations until his death. The certificate, which he received and held unaltered until his death, declared that his heirs and legal representatives should at his death be entitled to receive the benefit, and recognized his direction that it should be paid subject to his will. Now the money in question is a fund acquired for valuable consideration by the deceased. The certificate is a contract with him to pay his heirs and

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Judgment. legal representatives, and it is to be subject to his will.
MACLENNAN, Taking all this together it can mean nothing else than that
J.A. the money is, at his death, to be part of the estate of the deceased, and is to be disposed of as he may direct by his will.

But it is contended on behalf of the plaintiff that by reason of the rules and regulations of the society, and the provisions of the Act relating to Benevolent and Provident Societies, under which the Select Knights are incorporated, the plaintiff is the sole beneficiary under the certificate.

The society was incorporated in October, 1883, under R.S.O. (1877) ch. 167. By section 1 incorporation is authorized for any benevolent or provident purpose. By section 4 the society was empowered from time to time to make by-laws, rules and regulations for the government and conduct of its affairs, and from time to time to alter or rescind the same, and by section 11 it is provided that when, on the death of a member, any money becomes payable under the rules, the same shall be paid to the person entitled under the rules, or shall be applied by the society as may be provided by the rules, and shall be, to the extent of \$2,000, free from all claims by the personal representative or creditors of the deceased. These seem to be the only sections which have any bearing on the present case. The statute having authorized incorporation for any benevolent or provident purpose, the purposes of the society were declared to be: (1) To promote education, industry and union among its members. (2) To provide life insurance on the mutual assessment plan. (3) To assist its members when in sickness or distress. There is nothing in this declaration inconsistent with a benefit becoming at the death of a member part of his estate generally, and subject to be disposed of by his will, like any other life insurance. On the contrary, that is the kind of insurance that is contemplated. It is life insurance on the mutual assessment plan. If there is any such inconsistency we must find it in the constitution and by-laws. The earliest of these with which we have been

furnished is printed in 1889. Section 38 of that constitution is the one which provides for the certificate in question, and it declares that, upon the death of a member in good standing, such person or persons as said member may have directed while living shall be entitled to receive of the benefit fund such sum, etc., provided such member shall have complied in all particulars with all the laws, regulations and requirements of the society as are now in force, or may hereafter be enacted, and provided further that in case of disability for life to follow any avocation he shall be entitled to receive one-half the amount his heirs were to receive had he died that day, the remaining half to be paid at his death. There seems to have been no substantial change in the constitution or by-laws until the 1st of July, 1896, certainly not until after the year 1894, and I do not find anything prior to the change which can in the slightest degree qualify the effect of the plain language of the certificate that payment was to be made to his heirs and personal representatives, but subject to his will, if he made one. The member requested the certificate to be issued in that form, and in that form the society chose to issue it, and I think they had undoubted power to do so.

It was, however, argued that the certificate was affected by the new constitution which came into force on the 1st of July, 1896, in the lifetime of the testator, and which is very widely different from the former. This new constitution changes very much the objects of the society and makes the beneficiaries, who may be entitled at death, subject to the by-laws. The by-laws again (237, 238, 239, 240) limit the persons and classes of persons who may be named as beneficiaries to those therein specified, and expressly exclude creditors and persons designated by will only. Certainly, if this new constitution and by-laws could be held to be applicable to the certificate in question, the member's will would have to be excluded, although it might then be a difficult question what, if any, right the plaintiff would have under the designation of

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MACLENNAN,
J.A.

Judgment. "heirs and personal representatives." But I am clearly of
MACLENNAN, opinion that the new laws were not intended to affect and
J.A. did not affect existing certificates, and that they were
intended to regulate applications to be subsequently made
and certificates to be subsequently issued, and such acts as
might properly be done subsequently in respect of exist-
ing certificates, such as naming a new beneficiary or the
like. The language employed so plainly points to future
applications and future certificates that, in my opinion,
there is no ground whatever for the contention that the
effect of existing certificates was, or was intended to
be, altered. I therefore think that at Fawcett's death his
certificate was subject to his will, and that the money was
properly payable to his executors by virtue thereof.

It was further argued that section 11 of the Act was ap-
plicable and excluded creditors, so that the plaintiff is enti-
tled to the money under the terms of the will, free from
the debts. I am, however, unable to accept that view. The
section excludes the personal representatives as well as
creditors, but that is only in case some other person has
been named as the beneficiary, and in favour and for the
benefit of such other person. No other person having been
named, the exemption is inapplicable, and the executors
being entitled they must deal with the fund in their char-
acter of executors, and must administer it according to the
directions of the will.

We were referred to many authorities, but I do not find
that any of them affords any assistance to the contentions
of the appellant.

I therefore think that the appeal must be dismissed.

BURTON, C.J.O., MOSS, and LISTER, J.J.A., concurred.

Appeal dismissed.

R. S. C.

SCOTTISH ONTARIO AND MANITOBA LAND CO. V. CITY
OF TORONTO.

Municipal Corporations—Toronto Waterworks—Purity of Water—Injury to Hydraulic Elevator.

The plaintiffs complained that an hydraulic elevator in a building owned by them had been damaged by sand in water supplied from the city works and claimed damages :—

Held, per BURTON, C.J.O., that as the plaintiffs might have stopped using the water at any time they could not hold the city responsible.

Per OSLER, and LISTER, JJ.A., that the city being bound by law to supply water from their system of waterworks to any inhabitant of the city who applies therefor and complies with the statutory conditions, no contractual relationship arose between the city and the plaintiffs by reason of the application for water and the city's compliance therewith, and that the city were not liable, as upon a breach of contract to supply pure water, for injuries caused to the elevator.

Judgment of ROSE, J., 29 O. R. 459, affirmed.

THIS was an appeal by the plaintiffs from the judgment of ROSE, J., reported 29 O. R. 459. Statement.

The action was brought to recover damages for injuries to hydraulic elevators in a building owned by the plaintiffs, caused by sand in the water supplied by the defendants, and the appeal from the judgment dismissing the action was argued before BURTON, C.J.O., OSLER, and LISTER, JJ.A., on the 27th of March, 1899.

Langton, Q.C., and *H. M. Mowat*, for the appellants. That a contractual relationship exists between the plaintiffs and the city has in effect been decided in the previous appeal, 24 A. R. 208, but apart from that decision this is the result of the authorities ; and, having entered into a contract for profit, the city is liable: *Vreeland v. Jersey City* (1883), 37 N. J. Eq., 574 ; *Western Saving Fund Society v. Philadelphia* (1858), 31 Pa. St., at p. 183 ; *Stock v. Boston* (1889), 149 Mass. 410 ; *Provident Institution v. Jersey City* (1884), 113 U. S., at p. 514 ; *Morey v. Metropolitan Gas Light Co.* (1874), 38 N. Y. (Superior Court) 185 ; *Bailey v. New York* (1842), 3 Hill, at p. 539. There is also in this case a statutory liability. The city took over the water works under 35 Vict. ch. 79 (O.), and secs. 3,

Argument. 11 and 17, shew that there is an obligation to supply pure water. Apart from the Act, too, having contracted to supply an article for a certain purpose, the liability to supply an article fit for that purpose attaches: *Randall v. Newson* (1877), 2 Q. B. D. 102. The cases relied on in the judgment below are distinguishable. In *Milnes v. Mayor of Huddersfield* (1886), 11 App. Cas. 511, the water was pure when it left the mains of the defendants, and became impure because of the material of which the plaintiff's own pipes were made. In *Johnston v. Consumers' Gas Co.*, [1898] A. C. 447; and *Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex. D. 441, there was no privity, but here there is a duty towards, and a contract with, each water taker, and a special contract, into which the defendants were not bound to enter, with the plaintiffs.

Robinson, Q.C., and *Fullerton, Q.C.*, for the respondents. The previous decision in this case does not decide that a contractual relationship exists between the plaintiffs and the defendants, but it does decide that it is only by shewing a contract and a breach of it that the plaintiffs can succeed. This they fail to do. The defendants supply water in the exercise of their municipal functions, and have no option; each inhabitant of the city has the right to insist on being supplied, and no contractual relationship exists: *Attorney-General v. City of Toronto* (1893), 23 S. C. R. 514. The defendants carry out the undertaking for the public benefit, and each water taker knows what he is to get and how he is to get it, and cannot complain when he voluntarily continues to use water which is unsuitable for his purposes.

Langton, in reply.

May 9th, 1899. BURTON, C. J. O.:—

The defendants when this case was before the Courts on a former occasion treated the action as one for negligence and pleaded accordingly, but the other division of this Court held that it was not an action of that nature, but

was either one for breach of contract or of their statutory obligation, and the learned Judge below has held that the statement of claim is substantially the same as on the former occasion, and we agree with him in that view.

But if the claim is founded on a breach of a statutory duty, their responsibility must be ascertained by what we find in the Special Act, 35 Vict. ch. 79 (O.), and the amendments to that Act.

Notwithstanding some dicta to the contrary, I am of opinion that the Municipal Act and the General Waterworks Act have no application to this case.

It is familiar law that a general Act is to be construed as not repealing a particular one, that is, one directed to a special object or a special class of objects.

A general later law does not abrogate an earlier special one by mere implication. Having already given its attention to the particular subject and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention is manifested in explicit language.

What then are the statutory duties imposed upon the defendants under their special Acts? Under 35 Vict. ch. 79 (O.), the works were, when acquired by the commissioners, vested in the city, and it became lawful for the commissioners to erect the works, and their duties as a board were defined, under section 3, to examine, consider, and decide upon all matters relative to supplying the city by the means contemplated by that Act with a sufficient quantity of pure and wholesome water for the use of its inhabitants, and also to provide, build, or construct the necessary waterworks' buildings, machinery, and other appliances, for the said object.

They were empowered to regulate the use and distribution of the water, to fix the price, and to erect such number of public hydrants as they deemed expedient, and to direct the manner in which they should be used, with a proviso that all such public hydrants for the extinguishment of fires should be under the exclusive control of the

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C.J.O.

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BURTON,
C.J.O.

city. They had also power to make contracts for the supply of water and to pass by-laws for enforcing payment by suit or otherwise. It will be seen, therefore, that the duty imposed by the statute was partly of a public nature, as the obligation to furnish water gratuitously in the case of fires and partly private as in the case of being obliged to supply water to such of the inhabitants as required to be so supplied.

These were the duties imposed upon the commissioners, and when, by the Act of 1878, the works were transferred directly to the city of Toronto and a committee of the council substituted for the commissioners, nothing whatever is said about the liabilities of the corporation, but all the powers and duties, rights and privileges, conferred upon, vested in, and enjoyed and exercised by, the waterworks commission by and under the several statutes passed by the Legislature of Ontario are to be deemed and taken as having become vested in the corporation of the city of Toronto on the 31st of December, 1877, when the waterworks commission and the powers and duties thereof under the provisions of the said Act were determined and ceased.

It is unnecessary to express any opinion as to the rights of parties aggrieved, or fancying themselves aggrieved, by any breach of the statutory duty created under these Acts, as no such breach was proved by refusing to furnish water as required, whatever may have been the quality of the water supplied.

The case resolves itself, therefore, into a question of contract and assuming the application and the compliance with it to constitute a contract, what is the effect of it? It surely cannot be said that there was any warranty that the water was fit for the purpose for which it was required. Here was a sale of an existing article upon which the purchaser had the opportunity of exercising his own judgment, and there was no fraud on the part of the sellers, and even though the defect might not have been discoverable until after the water was in use, whenever it

was ascertained it was open to the plaintiffs to cease to take it and prevent the damage which subsequently occurred. I think the learned Judge was right in holding that the action was not maintainable.

I offer no opinion as to whether it might have been maintainable on the ground of negligence, if such had been proved. No such case is before us, and upon the material before us I think the appeal should be dismissed.

Judgment.

BURTON,
C.J.O.

OSLER, J.A. :—

I am of opinion that the judgment of my brother Rose should be affirmed on the short ground which I will mention, which I think is also substantially that on which he has himself placed it.

The action was not launched or tried as an action founded on tort. It is based on contract and on nothing else: 24 A. R. 208. As such, having regard to what is said in the judgment of Strong, C.J., in *Attorney-General v. City of Toronto* (1892), 23 S. C. R. 514, I think we ought in this Court to hold that it is not maintainable. That judgment would appear to be the judgment of the majority of the Court, concurred in as it is by Fournier and Taschereau, JJ. The case is not very carefully reported, as Mr. Justice Fournier is not mentioned on p. 514 as one of the judges present at the argument and judgment. At p. 519 of the volume the learned Chief Justice, speaking of the system of waterworks in question in this action, is reported as saying: "The waterworks were not constructed for the benefit of the ratepayers alone, but for the use and benefit of the inhabitants of the city generally, whether ratepayers or not. The provision embodied in sec. 480, sub-sec. 3, of the Municipal Act [R. S. O. (1887) ch. 184, afterwards 55 Vict. ch. 42, sec. 480 (3), now R. S. O. ch. 223, sec. 566, 4 (d), and originally 47 Vict. ch. 26, sec. 1], has a most important bearing upon this. That provision makes it a duty obligatory upon the city to furnish water to all who may apply for it, thus treating the corporation

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J.A.

not as a mere commercial vendor of a commodity, but as a public body entrusted with the management of the water for the benefit of the whole body of the inhabitants, and compelling them as such to supply this element, necessary not merely for the private purposes and uses of individuals, but indispensable for the preservation of the public health and the general salubrity of the city."

I am aware that these observations were not made in reference to an action like the present, but they were made in the course of and as part of an argument in which the legal situation of the city in respect of their water-works system seemed important to be considered. I do not see my way to passing them over as mere dicta, inasmuch as if they truly describe that situation they have a direct bearing on the case at bar. If the legal obligation of the city is that above described, if the supplying of water is under the statute strictly a municipal function or duty, and not a mere power conferred upon the city as a corporation, we cannot spell a contract out of the request made to the city by or on behalf of the plaintiffs on the 19th of April, 1893, and the city's compliance therewith. There was nothing more than the request necessary to raise the statutory obligation on the part of the city to supply the water, and whatever cause of action may have arisen out of subsequent events, I think it was not one for breach of contract.

On this subject I have looked at the following among other cases: *Vreeland v. Jersey City* (1883), 37 N. J. Eq. 574; *Western Saving Fund Society v. Philadelphia* (1858), 31 Pa. St. 175; *Stock v. Boston* (1889), 49 Mass. 410, 414; *Provident Institution v. Jersey City* (1884), 113 U. S. 506.

LISTER, J. A. :—

I agree with my brother Osler.

Appeal dismissed.

R. S. C.

IN RE LEAK AND THE CITY OF TORONTO.

*Municipal Corporations—Arbitration and Award—Lands Injuri-
ously Affected—Compensation—Damages—Interest.*

Compensation for lands injuriously affected in the exercise of municipal powers is in the nature of damages, and interest should not be allowed thereon before the time of the liquidation of the damages by the making of the award.

The distinction in this respect between such compensation and compensation for lands taken, or taken and injuriously affected, considered. Judgment of a Divisional Court, 29 O. R. 685, reversed.

THIS was an appeal by the city of Toronto from the Statement.
judgment of a Divisional Court, reported 29 O. R. 685, and was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 31st of January, 1899.

The facts are stated in the report below, and in the judgments in this Court, and the line of argument is there indicated.

Fullerton, Q.C., and *W. C. Chisholm*, for the appellants.
E. E. A. DuVernet, for the respondent.

June 29th, 1899. OSLER, J. A.:—

On the 16th of March, 1891, the city of Toronto passed a by-law authorizing the construction of new bridges on Dundas street, over the railway tracks crossing that street. The erection and construction of these bridges would have the effect of depriving the claimant of the access which he had theretofore enjoyed from his property, which fronted on Dundas street, and would therefore injuriously affect it to a very considerable extent. The works were proceeded with immediately after the passage of the by-law—contemporaneously therewith as counsel for the city stated in the argument—at all events, from that time forward the plaintiff's access to the street from his property was interrupted by the works, which are said to have been com-

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OSLER,
J.A.

pleted so far as to admit of the street railway tracks being laid down on the bridges at some time in the latter part of the year 1892.

On the 17th of June, 1893, an order was made by one of the Judges of this Court, pursuant to section 487 of the Municipal Act of 1892, referring it to one of the junior judges of the county of York, as sole arbitrator, to ascertain and fix the amount of compensation to be paid by the city to the claimant in respect of the damages, if any, necessarily resulting to him from the exercise of the powers of the corporation under their by-law in the construction of the works, and, after a prolonged and costly reference, the arbitrator, on the 22nd of February, 1897, made an award in favour of the claimant respecting the matters referred for the sum of \$8,782.41, with interest from the 16th of March, 1891, the date when the by-law was passed. The award was at first made in December, 1896, but the arbitrator had omitted to say anything about interest, and it was referred back to him on the application of the claimant by Robertson, J., on the 18th of February, 1897, to correct his mistake in that respect, if he should be so advised, and the order was made without prejudice to the right of the city to appeal from the award if amended upon the ground that interest could not legally be awarded. The city did appeal from the amended award on that ground, and on the 20th of April, 1897, an order was made by Street, J., referring the matter back to the arbitrator to award and state whether any, and if so, what land of the claimant had been taken, and also to award and state what part of the sum awarded had been so awarded in respect of land (if any) taken, and what part for injury done to adjacent lands, and also to alter and modify his award, if necessary, so far as the question of interest was concerned. And it was ordered that the disposition of the appeal, and the costs of the motion, should be reserved until after such further award had been made, and that the time for appealing from the order should be extended for the period in which it should be competent to appeal from any order

made on such further disposition of the appeal. In the judgment delivered by Street, J., on this motion, he expressed the opinion that unless some part of the sum awarded was for land actually taken it would be improper to award anything for interest, and that it should be clearly shewn on the face of the award whether that was the case, or whether the amount awarded was exclusively for injuriously affecting adjacent land by the raising or lowering of the street, in which latter case nothing should be allowed for interest.

Judgment.

OSLER,
J.A.

On the reference, Leak, the claimant, was examined as a witness, and a discussion took place as to whether damages had been awarded for land taken. It appeared then, as it had already appeared, that the city had deposited on the land of the claimant an immense quantity of earth, which formed a sort of slope or embankment as a support to the bridge or the ramp at its approaches, which was not intended to be removed, and could not without danger to the structure be removed, but that the arbitrator had not treated this as a taking of possession of the claimant's land by the city, and had assessed the damages upon the assumption that it could be built over and upon by the claimant by means of any wall which he might afterwards erect on the street line in levelling his property up to the height of the bridge, or otherwise building thereon so as to give him access at the new street level. This appeared to have been the contention put forward by the claimant in the first instance, and it was, as I have said, adopted by the arbitrator, and was the basis on which the damages were awarded.

On the 16th of November, 1897, the arbitrator published his new award, awarding thereby the same sum as before, but without interest, finding specially that none of the claimant's land had been taken, and that no part of the sum awarded was for land taken, but was wholly awarded for lands injuriously affected adjacent to Dundas street.

Thereupon the city moved to dispose of their appeal before Street, J., and for the costs reserved by the order

Judgment.

OSLER,
J.A.

referring back, and the claimant moved for an order to set aside the award of the 16th of November, 1897, and to refer it back on the ground that the arbitrator had erred in refusing to allow interest "upon the amount awarded as damages." The Chancellor dismissed the claimant's appeal, and ordered the costs of the former proceedings to be paid by him to the city. The Divisional Court, Ferguson, J., dissenting, reversed this order, and directed the award to be amended by striking out the words "without interest" and inserting in lieu thereof the words "with interest from the 16th of March, 1891, the said principal sum and interest to bear interest from the 22nd of February, 1897," the date of the first award by which interest was given.

In its turn the city appeals from the last order to this Court.

The single question upon which the attention of the parties seems to have been fixed from the time of the first motion before Robertson, J., is whether the claimant was entitled to interest upon the amount of the compensation, and I cannot see why this was not settled by the order made on that motion, instead of by the second appeal to Street, J.

It was contended before us on the argument of this appeal, that the award ought to be regarded as if made in respect of land of the claimant taken by the city, but I do not think this contention is open to him on the face of the award which he has not appealed from, and which, as we can see from the evidence brought before us, was founded by the arbitrator upon a wholly different contention on the claimant's part when the question of the subject matter of compensation was before him. The sum awarded must therefore be treated as having been given as compensation for injuriously affecting lands of the claimant adjacent to the highway; and the only question is, whether the arbitrator ought to have awarded interest upon the damages from the date of the by-law or from some other time.

In proceedings taken under the Lands Clauses Consolidation Act (Imp.) for the ascertainment of the compensa-

tion to be paid by a railway company or other public body for lands intended to be taken by them, interest is not dealt with, either by the arbitrators or by the jury when the amount is fixed by either of these tribunals. If the promoters desire to enter upon and use the land before the compensation has been ascertained, section 85 provides that they must give security for the payment of interest upon whatever sum may afterwards be fixed as compensation from the time of entering on the lands, but otherwise interest is payable as on an ordinary sale as between a willing vendor and purchaser, and therefore from such date as the purchaser might reasonably have taken possession after the award or verdict: *In re Piggott and Great Western R. W. Co.* (1881), 18 Ch. D. 146; *In re Spencer Bell and London and South-Western R. W. Co.* (1885), 33 W. R. 771; *In re Shaw and Birmingham* (1884), 27 Ch. D. 614; *Caledonian R. W. Co. v. Carmichael* (1870), L. R. 2 H. L. Sc. 56.

Similarly under that Act where the claim is as well for land intended to be taken as for compensation for injuriously affecting other land held therewith, the injurious affection of the latter arises from the taking of the former, and the whole compensation, though assessed separately under each head, is regarded as purchase money, and interest on the whole is not dealt with otherwise than as in the case where land only is taken. The promoters cannot enter upon the land intended to be taken in order to execute their works and so proceed to injuriously affect the other lands without giving security for payment of interest from the time of entry. If they do not enter before the compensation has been ascertained, interest will be payable on the sum awarded from the time at which they might reasonably do so. But when no land is taken the promoters are not restrained from proceeding with the execution of their works before making compensation for lands which may be injuriously affected thereby. The person entitled proceeds to have the compensation assessed before one of the tribunals appointed for the purpose, and the general rules

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OSLER,
J.A.

Judgment.

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J.A.

as regards the measure of damages in actions of tort are those which are usually applicable to determine the amount of the compensation: Browne and Allan's Law of Compensation, pp. 130, 141. Here, again, no question of interest arises, nor is any provision made under the Lands Clauses Act more than under our Municipal Act for giving interest to the claimant in such a case. The question, in a case like the present at all events, is strictly one of damage, and the damages so far as they can be foreseen ought to be assessed once for all. As it has been said: "The claimant must bring forward his claim in unity, as far as he can foresee the damages, estimating them as having as much permanency as the undertaking": *Chamberlain v. West End of London, etc., R. W. Co.* (1863), 2 B. & S. 617, at p. 639.

In proceedings under the Municipal Act [55 Vict. ch. 42 (O.)] for the expropriation of land, or authorizing works which may injuriously affect lands, section 483 provides that every council shall make to the owners of real property entered upon, taken or used by the corporation in the exercise of any of its powers, due compensation for any damages necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work, the claim for such compensation, if not mutually agreed upon, to be determined by arbitration under the Act.

The principles upon which compensation is to be assessed under this section seems to me not different from those applied under the English Act, except when the contrary is expressly provided, as for example in setting off advantage, etc. Where land is taken the compensation is purchase money; where it is merely injuriously affected, and no land is taken, the compensation sounds in damages strictly.

Under our Act the corporation has power to authorize the entry, and to enter upon lands intended to be taken under the by-law, leaving the compensation to be paid therefor to be afterwards ascertained.

This seems to be the effect of sections 401, 402, 403: *Harding v. Cardiff* (1881), 29 Gr. 308; (1882), 2 O. R. 329.

There is no express provision in the Act as to interest on the compensation in such case, but it has been rightly held, if I may say so, by analogy to the English rule, that the arbitrator may then properly award interest from the date of the by-law which authorized the taking and entry : *Re Macpherson and City of Toronto* (1895), 26 O. R. 558.

In that case the award was for damages for land taken and entered upon, and damages for injuriously affecting other lands by reason of severance from the lands taken.

See as to the nature of the injurious affection in a case of that kind : *Cowper-Essex v. Local Board for Acton* (1889), 14 App. Cas. 153.

Interest is given on the footing of the case being one of vendor and purchaser, and the damages are really the purchase money.

If it cannot be given on that ground, and the damages are to be regarded simply as unliquidated damages, I think we shall look in vain in the Act, or in the sections of the Judicature Act relating to interest, R. S. O. ch. 51, secs. 113-116, for any authority to award it.

There is a clear distinction between such damages—the compensation for land taken, and damages for merely injuriously affecting land by the deprivation of access to and from a highway. The latter are in the strictest sense of the words unliquidated damages, and no debt, statutory, legal or equitable, arises in respect of them until they have been ascertained and assessed by the appropriate means for doing so. No authority in the English Courts, or our own, has been cited to shew that interest can be awarded in such a case.

In the case at bar there was nothing, so far as appears, to have prevented the claimant from proceeding at once, under section 391, to have his compensation ascertained. The delay has been either his own delay or a delay caused by the extreme prolixity of the proceedings before the arbitrator. We can only assume that the arbitrator has given him the full extent of the damages he was entitled

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

to from the time when his property was first affected by the execution of the works under the by-law.

It by no means follows, as the Court below seems to have held, that because interest may be given upon damages which are in their nature the purchase money of land entered upon and taken, it can be given upon damages which are of a wholly different character. Agreeing, therefore, with the views expressed by the Chancellor, and Ferguson and Street, JJ., in the Court below, I am of opinion that the appeal of the city must be allowed, and the judgment of the learned Chancellor restored.

I refer to *McCullough v. Clemow* (1895), 26 O. R. 467; *McCullough v. Newlove* (1896), 27 O. R. 627; *In re Prittie and City of Toronto* (1892), 19 A. R. 503, 529, 530.

MACLENNAN, J. A. :—

I am of opinion that we should allow this appeal. I agree with the conclusion of my learned brother Ferguson in the Court below, and, as remarked by him, I have found no authority for allowing the interest in question. The rights and obligations of the parties depend on section 483 of the Municipal Act of 1892. That section provides that every council shall make to the owners of real property * * injuriously affected by the exercise of its powers, due compensation for any damages necessarily resulting from the exercise of such powers. The respondent's land was injuriously affected by the acts of the corporation, and he is to have compensation for his damage necessarily resulting from what was done, that is for the injury done to his land. The section provides that the claim for compensation, if not mutually agreed upon, shall be determined by arbitration. The Act provides for nothing else. The landowner is to have compensation for his damage arising from the injurious affection of his land, and that is the claim which the arbitrator is to determine. There is nothing whatever in the Act authorizing him to allow interest, either upon the compensation itself when deter-

mined, or as part of the compensation. The injury was complete, as I understand the facts, on the 16th of June, 1891, and the arbitrator was appointed on the 17th of June, 1893. The first award was made on the 22nd of February, 1897, and the amended award on the 16th of November, 1897. The original award gave the respondent \$8,782.41 with interest from the 16th of March, 1891. The interest was struck out on appeal to my brother Street, but was restored by the order of the Divisional Court now in appeal. On the face of the award, therefore, the sum of \$8,782.41 must be taken as the compensation determined by the arbitrator, and the interest is something over and above the compensation. There being no express authority given by the Municipal Act for the allowance of interest, its allowance can only be supported by some statute or some rule of law or equity. The Divisional Court seems to have proceeded on the authority of *Re McPherson and City of Toronto* (1895), 26 O. R. 558, in which, by an award made under the Municipal Act in 1895 for land taken and for land injuriously affected, interest was given on the compensation allowed under both heads from the year 1888. That was a judgment of my brother Street, and he allowed the interest on the authority of cases which were also cited to us, namely: *Rhys v. Dare Valley R. W. Co.* (1874), L. R. 19 Eq. 93; *In re Shaw and Birmingham* (1884), 27 Ch. D. 614, 619; *James v. Ontario & Quebec R. W. Co.* (1886), 12 O. R. 624; and 1 Sedgwick on Damages, 8th ed., secs. 313, 314, 318.

Now *Rhys v. Dare Valley R. W. Co.*, was a case under the English Lands Clauses Act, in which the railway company gave a notice to treat under section 18 for certain land, and soon afterwards took possession. Negotiations were then entered into between the parties, and ultimately the price was ascertained by the verdict of a jury. The landowner filed a bill for specific performance of the agreement embodied in the notice to treat, and the Court applied the rule of equity, that a purchaser who takes possession must pay interest on his purchase money from that time, even

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MACLENNAN,
J.A.

Judgment. though the contract makes no provision for interest. A similar principle was applied in *In re Shaw and Birmingham*. There was an award for £2,400, and afterwards that was increased by the verdict of a jury under the provisions of the Act then in question to £3,200, and it was held that the landowner was entitled to interest on the whole sum from the date of the award, Chitty, J., saying that the verdict was in regard to the sum which ought to have been inserted in the award itself. The decisions under the Lands Clauses Act afford very little assistance in this case, for that Act, by section 85, makes express provision for interest from the time of taking possession, and imposes a penalty for entering upon lands without consent before payment of purchase money or giving security as provided by section 85. There is no such provision in the Municipal Act, and whatever may be the proper conclusion in case of lands taken by a municipality I find nothing in the Act which authorizes an arbitrator to award interest upon compensation for lands injuriously affected.

If there is nothing in the Municipal Act it is a case of claiming interest upon unliquidated damages, which is not within any of the sections of the Judicature Act relating to interest, now R. S. O. ch. 51, secs. 113-116.

I refer to the following English cases for discussion of the general subject of interest: *Caledonian R. W. Co. v. Carmichael* (1870), L. R. 2 H. L. Sc. 56; *Phillips v. Homfray* (1890), 44 Ch. D. 694; *London, Chatham and Dover R. W. Co. v. South-Eastern R. W. Co.*, [1892] 1 Ch. 120; [1893] A. C. 429; and also to *McCullough v. Clemow* (1895), 26 O. R. 467, 472.

I think that the appeal should be allowed.

Moss, J. A. :—

I am of opinion that the award of the arbitrator, in which he awarded the sum of \$8,782.41 without interest, ought not to have been disturbed.

I agree with the conclusion stated in the award that no

land of the claimant was taken and that no part of the sum awarded had been awarded for land taken but was so awarded for lands injuriously affected. Judgment.
Moss,
J.A.

The nature of the injurious affecting was the interference with the claimant's access from his lands to Dundas street upon which they abutted.

The acts done were not acts of entering upon, taking or using his lands, but they affected the ingress and egress from and to Dundas street, and so injuriously affected his lands.

Omitting those parts of the provisions of the Municipal Act under which the claimant comes which are immaterial to the present question, the obligation of the corporation in a case where real property is injuriously affected by the exercise of its powers is to make compensation for any damages necessarily resulting from the exercise of such powers. In order to ascertain the damages for which compensation is to be made the arbitrators have to take into consideration any advantage which the claimant may derive from the contemplated work. But by the very words of the statute the thing to be ascertained is the damage necessarily resulting to the lands.

It is true that the damages inflicted by the work are not wrongful in the sense that they are inflicted without warrant. The word "injuriously" as used in the statute does not mean "wrongfully." In *McCarthy v. Metropolitan Board of Works* (1873), L. R. 8 C. P., at pp. 208, 209, Bramwell, B., says: "It means hurtfully or 'damnously' affected. * * At the same time, I am clearly of opinion that to entitle the parties interested to compensation, the injury or hurt must be such as could not lawfully be inflicted except by the powers of the Act. * * The act, therefore, injuriously affecting, must be one which would be wrongful but for the statute."

These remarks were made with reference to a statute in which the language as quoted by the learned Judge is very similar to that of the Municipal Act.

In this case it must be assumed that the acts done by

Judgment. the city would have been wrongful if not done under the statute.
Moss,
J.A.

Such being the nature of the acts the damages inflicted are to be compensated for, and in case of difference are to be ascertained by arbitration instead of by the verdict of a jury in an action for damages.

It appears to me that the sum recoverable by the claimant in such a case as the present still retains the quality of damages.

The same general rules are applicable with regard to the measure of damages as in an action of tort. The damages must be the natural and probable consequences of the act. They must be proximate and not remote. All the damages sustained by reason of the work are to be ascertained once for all, at all events so far as they can be foreseen, and all damages that can be foreseen should be claimed for and included in the award.

In the present case the compensation is for the damages necessarily resulting from the work done under the by-law of the 16th of March, 1891, and it must be assumed that such compensation includes all the damage that could be shewn to have been thereby inflicted.

I do not think that in its nature the claim is one in respect of which interest is payable until the amount has been ascertained.

And I do not see in the statute any authority to the arbitrator to add interest in such a case to the amount he has fixed upon as the damages necessarily resulting from the work.

I think the appeal ought to be allowed.

BURTON, C. J. O., and LISTER, J. A., concurred.

Appeal allowed.

R. S. C.

DALTON V. TOWNSHIP OF ASHFIELD.

Ditches and Watercourses Act—Failure to Comply with Award—Action—Purchaser from Party to Award.

No action lies to recover damages because of failure to comply with an award made under the Ditches and Watercourses Act; the remedy, if any, being under the Act itself.

The purchaser of land from an owner who was a party to proceedings under the Act in respect of that land is entitled to enforce the award.

Judgment of a Divisional Court reversed.

APPEAL by the defendants from the judgment of a Statement. Divisional Court.

The action was brought by a landowner to recover damages for the flooding of his lands and the consequent injury to his crops by water alleged to have been improperly cast upon it by the defendants, and for an injunction. The defendants pleaded, first, a prescriptive right; second, that the plaintiff's predecessor in title, and one Garvey, living across the road from him, and the defendants, were parties to a reference under the provisions of the Ditches and Watercourses Act, 1883, under which the defendants were required to keep in repair a certain box drain crossing the highway; that the plaintiff's rights, if any, were under the provisions of the said Act, and upon the terms of the award, and not by action; and third, that the plaintiff's damages, if any, were caused by his own neglect to keep open a certain drain upon his own land, which, by the terms of the award, he was bound to maintain. There was also a general denial of the plaintiff's claims.

The action was tried at Goderich on the 31st of May, 1898, before FERGUSON, J., who, on the 7th of June, 1898, gave the following judgment:—

FERGUSON, J.:—

The plaintiff is the owner of the east half of lot number five in the Lake road, concession west, in the township of Ashfield, containing sixty-six acres, more or less, and has

Judgment.
FERGUSON,
J.

been such owner some four years. His predecessor in title was a person named O'Keefe, if my recollection of the name is right.

This land of the plaintiff lies lower than the land to the east of it, belonging to one Thomas Garvey, and would, in the natural order and state of things, be liable to the flow over or upon it of the surface water from Garvey's land, and, as shewn by much of the evidence, there was upon the plaintiff's land a sort of depression resembling a not very well defined watercourse, in which the surface water collected and flowed to what was called an "outlet," and thence to the lake. I may, however, say that the lands in the neighbourhood seemed to me on the evidence to be so flat and low that one would scarcely expect to find a natural watercourse with well defined banks.

The Lake Shore road, now called the "Gravel road," runs in a direction nearly north and south between the lands of the plaintiff and those of Garvey.

The fourth concession road of the township meets this Lake Shore road on the east side at a distance of twenty-three and a half rods or thereabouts from the place of the flow of water across the Lake Shore road now complained of. This meeting is not at right angles, but this is not material.

Over thirty—some say nearly forty years ago—this Lake Shore road was graded, a ditch being formed on the east side of the turnpike of, as nearly as I could understand the evidence, about the width and depth that one ordinarily finds such ditches. Cross sections of the ditch were put in, but it was not contended that there was anything extraordinary in its dimensions. There was also a ditch on the west side of the turnpike, but little, if anything, was said about this at the trial. There were ditches from the east on the fourth concession road on each side of the turnpike emptying into this ditch on the east side of the turnpike of the Lake Shore road, the water in which ran to the place of the present difficulty and then crossed the road through a large log culvert towards the plaintiff's lands, then owned by his predecessor in title.

This state of things continued for a considerable period, when a change was made, continuing the ditch on the east side of the turnpike of the Gravel road north to a creek, and, in a way, filling up the large culvert, but not so doing completely, but leaving the timbers of it lying across underneath the road so that, as is said in the evidence, as much water passed through as could be carried by the present cedar box, which will be spoken of hereafter. This continued for a period. Garvey was not satisfied, and, as stated by a witness (the engineer), claimed, and still claims, the right to have the large culvert open.

Judgment.

FERGUSON,
J.

In the year 1889 the defendants, upon the requisition of Garvey, appointed an engineer, Mr. Warren, under the provisions of the Ditches and Watercourses Act, 1883, who, on the 8th day of November, 1889, made his award. This award stated how the necessary drains should be made and by whom. It was not said or contended that any of the requirements necessary to the full validity of this award had not been duly fulfilled. By the award the defendants, the township, were to put in a close box culvert, or pipe, 10 x 12 inches inside measure, of cedar at the place where the culvert had been; such box or culvert to extend across the road allowance and to be two feet six inches deep below the surface of the ground at the easterly limit of the road allowance at the place of the culvert, and this culvert was to be maintained by the defendants.

The then owner of the plaintiff's lands was by the award to commence at the westerly end of the box or culvert and to dig or deepen his then ditch forty and a half rods, commencing at the depth of fifteen inches and carrying this level out to where the ditch entered the natural outlet so as to give the water an even fall or run, and was to maintain the ditch. The award provided that this portion of the ditch might at any time be covered, but that there should be a sufficient outlet for any water that might pass through the culvert from the lands of Garvey.

These works were professedly done pursuant to the award, and the then owner of the plaintiff's land was the inspector of the work while it was being done.

Judgment.FERGUSON,
J.

The cedar box culvert was put in at the expense of the defendants under such inspection. Garvey put in two board drains, having together a sectional area of about twenty-three and a half square inches, and carried these into the cedar culvert, but was at liberty for the purpose of draining his land to put down as many more as he thought proper.

The then owner of the plaintiff's land put down one board box drain of a sectional area of about twenty-nine and three-quarter inches. Many things were said about this drain on the plaintiff's land not having been properly located, etc. But apart from all this, the evidence is that if the then owner of the plaintiff's land had either left his ditch open as he might have done, or in putting in a covered drain, which, under the award, was optional with him, had put in one equal in size to the cedar box culvert across the road allowance put down by the defendants, the present or any difficulty could not have arisen.

The plaintiff complains that, by reason of the negligence of the defendants, water is brought upon his lands, depriving him of the proper and full use of the lands for the purposes of cultivation. He concentrates his complaint in the ninth paragraph of the statement of claim, thus:—

“9. The plaintiff charges the defendants with negligence in the construction and in the maintenance of the said culvert and of the said highway, and in bringing upon the plaintiff's land water from the said highway and from the adjoining lands, and that the said culvert is improperly constructed and is not necessary for the proper construction and maintenance of the said highway.”

The full meaning of this may be a little difficult to gather, but I take it, at all events, to embrace a charge of negligence in the construction and maintenance of the cedar culvert, and I now think that such is really the gravamen of the plaintiff's complaint.

There is evidence shewing or going to shew that owing to part of the cedar culvert on the east side of the turn-pike having become uncovered or bare, some water from

the ditch entered it, and that water entered the culvert through an open hole in Garvey's box leading from the culvert to his land, this last being upon Garvey's lands and not in the road allowance.

The plaintiff's father (who, it was insinuated, is the real owner) in giving evidence on behalf of the plaintiff, said that if the cedar culvert had been in good repair all the water of which the plaintiff complains would have passed on down to the creek in the ditch on the east side of the turnpike. And, assuming this to be so, it is plain that it could not have injured the plaintiff.

It appeared from the evidence that at no time after the works were done under the award did any water pass from one side of the turnpike to the other that did not pass through this cedar culvert, except sometimes on the occasion of freshets, when some passed over the turnpike at points not far from this place. This was not made a matter of importance at the trial.

The plan of taking care of the waters adopted by the award was, so far as appears, satisfactory, and the parties acted upon it, no doubt in good faith.

The plaintiff's predecessor in title was a chief actor in the construction of the works, he being the inspector, as before stated.

The plaintiff sought to disclose a cause of action by shewing that an increased quantity of water was brought down the ditch on the east side of the turnpike after the making of the award and completion of the works under it, but in this I think he failed.

In my opinion, the evidence does not shew that there was any appreciable increase.

The action is, I think, an action against the defendants substantially for alleged non-repair or improper maintenance of the cedar culvert, the plaintiff claiming damages, which he says resulted to him.

The defendants set up and relied upon the award and the Act, the Ditches and Watercourses Act.

In my view of the case it seems to fall plainly under

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FERGUSON,
J.

the provisions of secs. 34 and 35 of 57 Vict. ch. 55 (O.), now sections having the same numbers in R. S. O. ch. 285, and I think the remedy there given and pointed out is an exclusive one. The remedy would, as I think, be exclusive and the only one even if the words of the sections were not as plain as they are.

It was contended on the part of the plaintiff, that, as the claim is for damages and not a claim to have the maintenance of the culvert enforced, the case does not fall under these sections and that there is a remedy by action.

The scope of the Act seems to me to be against this contention, and I think the cases of *Murray v. Dawson* (1867), 17 C. P. 588, and *Hepburn v. Township of Orford* (1890), 19 O. R. 585, are authorities against it. In each of these cases damages were claimed. Non-completion of the construction of a ditch and neglect or default in the maintenance of it after completion seem to be in this regard placed on the same footing by sub-sec. 2 of sec. 35 above referred to.

I am of the opinion that the plaintiff's remedy, if any he has or is entitled to, is the remedy given by the Act and that only.

I only desire to add that the amount of damages claimed and sought to be established by evidence seems to be an extravagant estimate, even if it should be assumed that he could recover.

The action should, I think, be dismissed with costs.

The plaintiff moved against this judgment on the 24th of January, 1899, before a Divisional Court [ARMOUR, C.J., FALCONBRIDGE, and STREET, JJ.], and on the 13th of January, 1899, the judgment of that Court was given as follows :—

ARMOUR, C. J. :—

The damage of which the plaintiff complained arose from two concurrent causes, each the result of the negligence of the defendants, one cause being their neglect to

keep the culvert in repair, and the other their neglect to keep the drain on the east side of the gravel road in repair; if they had kept the culvert in repair, the water from the drain could not have gone into it, and if they had kept the drain in repair, the water from it could not have escaped into the culvert. The plaintiff's remedy for the former cause was under the Ditches and Watercourses Act, and for the latter was by action at law, and this remedy he has rightly adopted by this action.

Prior to 1881 there was a culvert intended to carry the water from this drain across the Gravel road and on to the plaintiff's land, which was said to have been the natural course of the water, and prior to that date water had been brought down to this drain and culvert from the fourth concession line which would not naturally have flowed there, and was thence discharged on the plaintiff's land. In 1881 this last mentioned culvert had become decayed and had fallen in, and, owing to the large quantity of water which by that time had been brought into this drain and culvert, and the injury occasioned by it to the adjoining lands, the defendants determined to and did continue the drain northward to Finn's creek, intending thereby to carry the water which had previously passed through the culvert to Finn's creek. After this drain was continued to Finn's creek and up to 1889, it is said that some water still found its way through the ruined culvert. In 1889 an award was made by an engineer under the Ditches and Watercourses Act requiring the defendants "to put in a close box culvert or pipe, 10 x 12 inches inside measure, of cedar, at where there was a culvert, at the distance of twenty-three and a half rods measured northerly along the Gravel road from the southerly limit of said lot four, said culvert to extend across the road allowance and to be two feet six inches deep below the surface of the ground at the easterly limit of the road allowance, where the culvert is to be put in; the corporation to maintain said culvert; this box or culvert is put in without prejudice to any action that may be taken to have the culvert formerly at this place re-opened."

Judgment.

ARMOUR,
C.J.

Judgment.

ARMOUR,
C.J.

This last mentioned culvert was put in solely for the purpose of taking the water from the land of one Garvey, which lay on the east of the Gravel road and opposite to the land of the plaintiff, and it was not by it intended to in any way affect the drain on the east side of the Gravel road, or to take any of the water from it. I doubt if ever this culvert was a close box as required by the award, or if it was put down to the depth prescribed by the award. It seems that by the time this last mentioned culvert was put in the water ceased to find its way through the ruined culvert, and, at all events, upon putting in of the last mentioned culvert, it ceased to find its way through the ruined culvert, and that culvert was stopped up, and the water, instead of finding its way through that culvert, flowed northward along the drain to Finn's creek, as it was intended it should by the defendants when they continued the drain to Finn's creek in 1881. The defendants having constructed this drain and having brought more water into it than would have naturally flowed into it, were bound to keep it in repair and to see that no injury was done by the water brought into it and which flowed along it.

The plaintiff is, in my opinion, therefore, entitled to recover in this action, and it does not detract from his right to recover that part of his damage was occasioned partly by one cause and partly by another: *Ellis v. Clemens* (1892), 22 O. R. 216.

But the difficulty is to distinguish between the damage arising from one cause and that arising from the other. He was bound to make drains on his own land for the water that properly came through the culvert, but not for the water that came from the drain.

I think that we shall be doing what is just in awarding him \$30 and enjoining the defendants from allowing water to escape from the drain on to his land.

FALCONBRIDGE, J.:—

I agree in the result.

STREET, J. :—

Judgment.

STREET, J.

At the time of making Mr. Warren's award in November, 1889, the water which collected upon the highway to the south and south-east of the point where the box drain was made under the award ran along a ditch upon the easterly side of the Gravel road, in a northerly direction, past the plaintiff's land, and discharged itself into Finn's creek, by which it was then carried into Lake Huron; and none of this water, as I understand the evidence, found its way upon the plaintiff's land, excepting, perhaps, in times of excessive flooding, when it might overflow the ditch. This, however, could only happen when the whole country was flooded and no harm would result.

In 1889, Garvey, who owned the land across the Gravel road from the plaintiff's land, desired to drain his land by carrying a drain across the Gravel road and through the land owned by the plaintiff, which was then owned by one O'Keefe. Thereupon, after notice to the defendants and to O'Keefe, an award was made by the engineer, Warren, directing the putting in of a box drain under and completely across the highway and a drain connecting with it on O'Keefe's side of the road. The defendants were required to keep the box drain in repair and O'Keefe was required to keep the connecting drain on his side in repair. This award, however, was made for the specific and limited purpose of carrying off the water from Garvey's place only, and did not profess to deal with or provide for, and did not require the defendants to receive or carry away, any water that did not come from Garvey's place. The level of the highway and even of the bottom of the ditch I have referred to running along its easterly side, were so much above the level of the land of Garvey and O'Keefe on each side of it, that it was necessary that the box drain from one to the other should pass several inches below the bottom of the ditch. There is no complaint from any one that the box drain is not in perfect working order so far as the functions which it was

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STREET, J. intended to perform under the award are concerned, that is to say, it is open and carries off without difficulty all the water which accumulates upon Garvey's place. The trouble complained of arises from another cause, which has nothing to do with the award. It appears that the top of the box drain is made of two boards, which do not meet in the middle by two or three inches, and the result is that some of the water which should run along the ditch northerly to Finn's creek escapes into the box drain and runs from it into the plaintiff's fields. The learned Judge has come to the conclusion upon these facts that the real complaint of the plaintiff against the defendants is that they have not kept the box drain in repair, and that his remedy against them is not by action, but by proceedings under the Ditches and Watercourses Act. With great respect, it seems to me that this is not the proper view of the case. If proceedings had been taken by the plaintiff, as successor in title to O'Keefe, under the Act, and the engineer had been called in, he would have been in duty bound to report that the box drain was in perfect repair so far as the intention of the award required. It serves in that capacity properly and effectually its duty as the top of the box drain; it is defective only in another capacity, viz., as the bottom of the township ditch, with which the award has nothing to do. Looking at it in this, which I think is the proper, view, the judgment cannot be sustained upon the ground on which it has been placed, for the defendants, having by their ditch brought water from the south and east, are liable in damages if they allow it to escape through the bottom of their ditch, or in any other way, upon the plaintiff's land.

I do not think the defendants have shewn any prescriptive right to cast this water upon the plaintiff's land. It appears that down to the year 1881 the water from the south ran along the ditch at the side of the highway until it reached the point where the box drain now is, or near it, when it crossed the road by a culvert and running through the plaintiff's land found a natural outlet beyond it. In

1881 the council filled up the culvert with logs and continued the ditch to the north along the roadside, cutting through a slight raise on the way, and intended to take all the water to Finn's creek. It is stated, however, that a good deal of it from time to time found its way through the spaces between the logs upon the plaintiff's land. The water reaching the plaintiff, however, by this sort of percolation must have naturally decreased year by year as the spaces became more completely packed in with earth, and would not entitle the defendants to open a new channel by which additional water should be cast in a direct stream through this box drain upon the plaintiff's land, and to defend their action upon the ground of prescription. The new body of water and the concentrated form in which it came were new trespasses not covered by the prescriptive right, supposing it to have been acquired, to cast percolating water upon the plaintiff. I think, however, that it stands to reason that the work done in 1881 with regard to the old culvert must have made very material changes in the flow of water running along the east side of the highway, and that any prescription claimed must be taken to date from then. Down to that time the only outlet for this water was through the culvert and across the plaintiff's land; the change made was the filling up of the culvert with logs and the opening of a new outlet to the north along the highway to Finn's creek. Unless this work was utterly thrown away, it must be assumed that from that time the quantity of water getting from the highway to the plaintiff's land was very greatly decreased. No one pretends to say that this new outlet was not effectual, although it was said that a good deal of water still found its way between the logs.

The plaintiff, therefore, in my opinion, has made out that the defendants have brought a certain quantity of water from the highway upon his land which he was not bound to take, and they have in their pleadings set up a prescriptive right to do so, and have failed to make it out.

Judgment.

STREET, J."

Judgment. The actual amount of the damage caused to the plaintiff
STREET, J. is almost a matter of guess-work, because he has not kept open the drains which he was bound to maintain for the carrying away of the water from Garvey's place coming to him under the award, with the result that it has assisted in flooding his land. I think under the circumstances, we cannot fix them at more than the nominal sum of \$30, but he has asked for an injunction in addition to damages, and I think he should have one restraining the defendants from allowing the water brought down by the ditch upon the road opposite his farm to flow upon his land, and that the defendants should pay the costs of the action and of the motion before us, and that judgment should be entered accordingly, the present judgment for the defendants being set aside.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 15th and 16th of May, 1899.

Garrow, Q.C., for the appellants. The judgment appealed from proceeds on the erroneous conclusion that this is an ordinary culvert and that the appellants by reason of their failure to keep it in repair are discharging surface water upon the plaintiff's lands. Clearly this is an error. The culvert was made in compliance with the award under the Ditches and Watercourses Act, and if it is not such a culvert as should have been made, or if it is out of repair, the plaintiff's remedy, and only remedy, is that pointed out in the Act: *Hepburn v. Township of Orford* (1890), 19 O. R. 585; *Murray v. Dawson* (1867), 17 C. P. 588; *Re Stephens and Township of Moore* (1894), 25 O. R. 600. [The learned counsel also contended in the alternative that, on the evidence, the defence of prescriptive right had been made out.]

Shepley, Q.C., for the respondent. The appellants are using the culvert for purposes altogether outside the matters dealt with by the award and so are liable on the

general principle applicable where surface water is brought by one person to another person's land. This is the distinguishing feature in this case. Enforcement of the award to its full extent will not protect the plaintiff, and enforcement of the award is therefore not his only remedy. Argument.

Garrow, in reply.

June 29th, 1899. The judgment of the Court was delivered by

Moss, J.A.:—

Among the matters in dispute between the parties to this appeal there are some which do not admit of serious question.

From the year 1860, when the Lake Shore road was macadamized, until the year 1881, the waters flowing to the north from the line between the 4th and 5th concessions of the township of Ashfield and to the south from what is called Finn's hill along the ditch on the east side of the Lake Shore road met at and found their way through a large culvert constructed across the road at the point now in question.

From the western mouth of the culvert these waters discharged on the land then belonging to one O'Keefe and now owned by the plaintiff, and found their way over his land through a natural depression or waterway which gradually widened and deepened into what is described as a gully until they reached a creek emptying into Lake Huron.

The surface water of the farm lying to the east of the Lake Shore road, then and now owned by one Garvey, flowed towards the road at the place where the culvert crossed and were carried through it, with the other waters collected in the ditch, over to O'Keefe's land.

The culvert was three or four feet in width, the sides constructed of logs, with a plank top level with the sur-

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face of the road. In 1881, during the period of high water, the foundations of the culvert were undermined by the action of the water and the structure caved in.

The township authorities instead of rebuilding it decided to leave the timbers lying as they had fallen and to level up with earth and gravel the depression caused by the cave in.

At the same time they deepened the east ditch from the culvert to the north so as to make a fall through Finn's hill to the creek beyond and thus lead the waters flowing in the ditch from the 4th concession to Finn's creek. It was proposed to completely fill up and do away with the culvert, but Garvey objected, apparently on the ground that to do so would deprive him of the outlet for the waters from his farm; and accordingly it was determined to leave the old timbers in the bottom of the culvert and level the surface of the road.

This, though not entirely satisfactory to Garvey as a means of relieving his land of water instead of the original culvert, continued to be the condition of matters until the year 1889, when, upon the requisition of Garvey, the township engineer was put in motion under the provisions of the Ditches and Watercourses Act and made the award set out in the judgment appealed from.

The object and intention of the proceedings, of the award, and of the work done under it, were to conduct the water from Garvey's land across and under the roadbed and carry it through O'Keefe's land to the natural gully or outlet thereon, so that thereafter Garvey would have no difficulty with regard to it.

That work had no reference to the system of road drainage which had been adopted by the defendants; and, no doubt, with a view to making sure that it would not interfere with the flow of the water in and along the side ditches of the road, it was directed that the box culvert or pipe across the road should be a close box and should be placed two and a half feet below the surface of the ground.

Its top was thus a considerable depth below the bottom of the east side ditch.

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Moss,
J.A.

The box culvert or pipe was directed to be put in by the defendants but was actually constructed and put in by Garvey under the superintendence of O'Keefe, who was appointed inspector of the work. It was of dimensions sufficient to carry off all the water ordinarily collected on Garvey's farm, but it was contemplated that at times it would be liable to be filled to its utmost capacity.

O'Keefe was directed by the award to dig or deepen the existing ditch on his lot from the western mouth of the box culvert or pipe for a distance of forty and a half rods, giving a fall sufficient to carry the water to the natural outlet, but it was provided that this portion of the ditch might at any time be covered, but that there must be a sufficient outlet for any water that might pass through the culvert from Garvey's land.

O'Keefe acted upon the permission to cover his ditch by placing in the western mouth of the box culvert a short pipe or box 8 inches square and 8 feet in length. The westerly end was placed at a lower level than the end in the box culvert so that it did not fit squarely into the mouth of the box culvert but came from it slopingly and so made a partial obstruction on the bottom at the junction of the two pipes.

The western extremity of the eight foot box met and joined end to end with a drain constructed of two planks, each eight inches wide, joined together in the shape of an inverted V (whence it derives the name of V drain), which was continued on towards the gully in O'Keefe's farm.

From the time of the construction of the box culvert and the covered drains or pipes on the O'Keefe farm until the year 1895, when the plaintiff purchased it from O'Keefe, the latter appears to have made no complaint.

The plaintiff during the year 1894 was tenant of the property he now owns, and he says that in that and the subsequent years he observed that when the waters coming in the road ditch along the east side reached the place

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where the box culvert crossed the road they seemed to disappear through the bottom of the ditch down to the box culvert and to gain access thereto in some way, and so be conveyed across the road to and discharged into his drain. And he says that inasmuch as more water was thus brought to his drains than they were capable of carrying away, the effect was that the excess quantity came to the surface and overflowed his land.

On the 28th of August, 1897, he brought this action, claiming damages for injury to his land and crops in the years 1895, 1896, and 1897, and a perpetual injunction restraining the defendants from maintaining the culvert on the highway and the ditches leading thereto, and from causing the water to flow in and upon the plaintiff's land.

Shortly before the trial an examination was made of the *locus in quo*, and, upon removing the earth covering the box culvert between the east side of the roadway and Garvey's fence, it was found that at a point in the box three or four feet east of the ditch proper there was an opening, caused by the ends of two planks forming part of the top and side of the box culvert failing to form a close joint with the contiguous planks. At the trial Garvey was a witness and proved that when constructing the culvert he covered this aperture on the top by laying a short piece of plank over it without nailing. The culvert was then covered with earth. This piece of plank seems to have remained in place for some years but was found displaced when the opening was made previous to the trial.

It is conceded that some of the water coming in the east ditch escapes into the opening in the box culvert and is thus carried along with the water from Garvey's land to the mouth of the drain on the plaintiff's land. It is not questioned that such water is alien to the purpose for which the box culvert was constructed and that it should not go into or through it, but should be conducted in the east ditch to Finn's creek.

The learned trial Judge found, and the evidence fully

justifies his finding that if O'Keefe, the plaintiff's predecessor in title, had either left his ditch open, as he might have done under the award, or had put in a covered drain equal in size to the box culvert across the road, the difficulty could not have arisen.

At the trial the chief question raised was whether the escape of the water into the box culvert was, as the defendants contended, owing to neglect to properly maintain the box culvert as directed by the award, and so remediable only by recourse to the provisions of the Ditches and Watercourses Act and not by action, or whether, as the plaintiff contended, it was due to negligence on the defendants' part in bringing the water in the ditch to the point in question and failing to prevent it getting out of the ditch into the box culvert.

The trial Judge held in accordance with the defendants' contention and dismissed the action. The Divisional Court on the contrary decided in favour of the plaintiff's contention and awarded him the nominal sum of \$30 damages and an injunction restraining the defendants from permitting any water to escape upon the plaintiff's land from the defendants' drain on the east side of the road through the box culvert.

The judgment of the Divisional Court is in substance a judgment to compel the defendants to repair the box culvert, or, in other words, to maintain it as required by the award. For it is quite apparent that the defendants' easy if not only way of complying with the injunction is to make the culvert a close box culvert. That will at once end the possibility of any water from the east ditch getting to the plaintiff's land.

As shewn by the small award of damages the gist of the action was not the damage already suffered, but the prevention of the continuance of the flow of alien water into the box culvert and so upon the plaintiff's land. And the most ready way of preventing it was by maintaining the box culvert in the condition of a close box culvert as

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J.A.

directed by the award. Probably the escape from the ditch could be prevented by other means, such as constructing a water tight wooden or stone drain for some distance along the east side of the road where it crosses the box culvert, but that would be unusual and extraordinary in a rural municipality and besides being much more expensive would not be in the least more efficacious.

The construction of the road ditch was not inherently defective. It was and is properly constructed for the purposes for which it was intended, viz., the conduct of the water flowing along the side of the road towards and into Finn's creek. That it fails to wholly perform its functions and that some of the water coming in it gets into the box culvert is due to the fact that the latter is not now a close box culvert.

And that defect is due to failure in maintenance, which means and includes "preservation and keeping in repair": sec. 3 of the Act, R. S. O. ch. 285, sub-head "maintenance."

The duty of maintenance of the box culvert is cast upon the defendants, and the manner of enforcing the duty is declared by sections 34 and 35.

Any owner, party to an award, whose lands are affected is to notify the defaulting owner to have his portion put in repair within thirty days, and if the repairs are not made and completed within that time, the party giving the notice may notify the engineer to inspect the portion complained of, and it thereupon becomes the duty of the engineer to make an inspection and give directions as to what he may find necessary to be done: section 35. And any neglect to make such inspection after notice is punishable by fine: section 37. Then comes section 38, which enacts that no action, suit, or other proceeding, shall lie or be had or taken for a mandamus or other order to enforce or compel the performance of an award or the completion of a ditch, but the same shall be enforced in manner provided for by the Act.

The plaintiff's predecessor in title was a party to the

award, and the plaintiff as his assign stands in his place and is, I think, to be considered an owner, party to the award, under the Act.

Judgment.

Moss,
J.A.

The defendants having been directed by the award to maintain the box culvert, the work of preservation and keeping in repair is performance of the award. And performance is to be enforced as provided by the Act, and not by action, suit, or other proceeding.

This is in accord with the spirit and intention of the Act which, as said by Wilson, J., in *Murray v. Dawson* (1867), 17 C. P. 588, at p. 592, "was to place in the hands of either party interested the right to specific performance of the relief sought, but not damages by suit for non-performance of it."

I think, therefore, that the learned trial Judge rightly determined that the plaintiff's remedy was by recourse to the provisions of the Ditches and Watercourses Act.

It is not necessary to discuss whether, if the plaintiff had sustained substantial damages, before he could have called in the engineer and obtained his directions, he could have maintained an action for the recovery of such damages, for the facts do not present such a case.

The plaintiff might in 1895 have called in the engineer and had the box culvert made right before even the trifling damage which he has been found to have sustained during three years had been suffered.

There seem to be other difficulties in the plaintiff's way of obtaining damages.

It is shewn that the box culvert was put in under the superintendence of O'Keefe, the plaintiff's predecessor in title, who was appointed inspector for that purpose. It was, therefore, his duty to see that a close box culvert or pipe was put in according to the directions of the award. Through his neglect of that duty an imperfectly closed box culvert was permitted to be put in and has caused the present mischief. Could he or any one claiming under him complain, or maintain an action for damages under the circumstances?

Judgment.

Moss,
J.A.

Again, the drains made by O'Keefe upon his own land are not in compliance with the award, and their want of capacity contributes to, if it does not wholly cause the mischief.

Further, up to the year 1881, when the original culvert fell in, all the water coming in the side ditch from the north and south was cast upon the plaintiff's land. And the evidence supports the finding of the learned trial Judge that from that date until the box culvert was put in, in 1889, as much water flowed through the fallen timbers of the original culvert as could be carried by the box culvert.

The putting in of the box culvert was not done for the purpose of relieving the plaintiff's land from any of the ditch water which had formerly flowed upon it, although the work then done undoubtedly had that effect.

There was no duty on the part of the defendants to protect the plaintiff's land from so much of the water coming in the east ditch as formerly went upon his land. There was no undertaking or agreement express or implied that they would do so in the future.

The defendants' right to carry water across the road at that point can scarcely be called an easement, for it was the natural point of concentration. But if it was an easement there is really no evidence of abandonment. According to the plaintiff's own shewing some water has been coming through every year from 1894 inclusive, and so the lapse of time from 1889 would not in itself establish an abandonment.

The evidence, coupled with the language of the award, shews that what was done under it was not to prejudice any action that might be taken to restore the original culvert.

There was, therefore, no intention to abandon the right to conduct the water from the east side ditch to and upon the plaintiff's land.

I only indicate, but do not proceed upon, these objections.

Upon the ground that the plaintiff's remedy was under the Ditches and Watercourses Act, I would allow the appeal and restore the judgment of the trial Judge.

Judgment.
Moss,
J.A.

Appeal allowed.

R. S. C.

FRASER V. LONDON STREET RAILWAY COMPANY.

Street Railways—Negligence—Damages—New Trial.

AN appeal by the defendants from the judgment of a Divisional Court in the plaintiff's favour, reported 29 O. R. 411, and a cross-appeal by the plaintiff from that judgment in so far as it reduced the damages awarded to him at the trial, were argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 11th of May, 1899.

I. F. Hellmuth, for the defendants.

Aylesworth, Q.C., and *A. Stuart*, for the respondent.

At the conclusion of the argument the appeal was dismissed with costs, and on the 29th of June, 1899, the cross-appeal was dismissed without costs, the Court expressing no opinion as to the power of the Court below to make the alternative order for payment into Court of the amount of the judgment, and for a medical examination of the plaintiff at the end of a year.

R. S. C.

WINN V. SNIDER.

Sale of Goods—Bills of Sale Act—Subsequent Purchaser.

A purchaser of goods who neglects to comply with section 6 of the Bills of Sale Act cannot invoke its provisions as against a subsequent purchaser in good faith, and the latter, even though he also has not complied with the Act, obtains priority.
Judgment of ROSE, J., affirmed.

Statement. APPEAL by the defendant from the judgment at the trial.

The action was brought to recover damages for the conversion of certain chattels, and both parties claimed title to them through one Meyer. The chattels in question were a portable engine and boiler and the drills and other machinery for drilling wells.

On the 21st of April, 1898, the defendant entered into an agreement with Meyer to purchase the chattels, and made a small payment on account. The chattels were left in the possession of Meyer, who was at the time working on an unfinished contract, and no bill of sale was executed.

On the 23rd of April, 1898, the plaintiff and Meyer began negotiations for the sale of the chattels to the plaintiff, and on the 25th of April an informal agreement was executed. There was conflicting evidence as to the *bona fides* of this agreement and as to the plaintiff's knowledge at this time of the defendant's claim, which was, however, admittedly made known to him some time that day.

On the 26th of April, in consequence of the defendant's claim, the plaintiff went through the form of taking possession of the chattels, which remained, however, in the actual possession of Meyer, who went on with his work till the evening of the 27th of April.

On the 26th of April a bill of sale was made by Meyer to the plaintiff, but this bill of sale was not registered.

On the 28th of April the defendant took the chattels from Meyer, and this action was brought on the 29th of April.

It was tried at Berlin, on the 19th of September, 1898, Statement.
before ROSE, J., who, at the close of the case, gave the following judgment.

ROSE, J. :—

The case is an interesting one, and is not free from doubt, because there is some difference of opinion among the learned Judges, but I have reached a conclusion as to what I am compelled to do in the light of the authorities.

Here, as a fact, the defendant made a prior purchase. I do not stop to consider whether his contract is sufficiently evidenced within the provisions or meaning of the Statute of Frauds. I assume, for the purpose of considering the case, that he had a contract which he might enforce against the vendor, without so determining. That is on Thursday. Then, on Saturday or Sunday, as I accept the evidence of the vendor or of the vendee, the plaintiff made a parol agreement to purchase. Very early on the Monday morning this agreement was reduced to writing, which writing is before me. Possession was not immediately given, nor, perhaps it may be argued, was it intended to be given, according to the terms of the agreement, until that work was done. But, possibly by reason of advice under which the parties acted, the written agreement drawn up on Monday morning was followed by a bill of sale the next day, and a formal giving of possession was gone through.

If the taking of possession were in my view an element in the case, it would require much more serious consideration than I am giving it. The vendor in fact retained possession of these articles for the purpose of going on with the work he had contracted to do. The profits and benefit of the work then being done were to go to him, and the plaintiff did not receive any benefit from that work, as I understand the evidence. The plaintiff was there, and remained on or about the work, working at whatever he could do, until the work was completed.

Judgment.

ROSE, J.

I have not determined definitely in my own mind whether that would be in law a taking of possession, and if the case is further considered, it will be open to the defendant to contend that the view I am taking is erroneous.

The question then arises, is the subsequent purchaser named in the 6th section of R. S. O. ch. 148, a purchaser who is required to take possession, to whom delivery must be made, so that there is not only immediate delivery, but an actual and continued change of possession?

The reason that affects my mind is one which would have led me to a different conclusion had I been without the assistance of the decision reached in *Moffatt v. Coulson* (1860), 19 U. C. R. 341. It seems to me the object of the statute was that notice might be given so as to protect purchasers from prior purchases made without their knowledge, and without knowledge of which they made the purchase; and when the statute declares that if one person, without observing the provisions or formalities of the Act, obtain a contract it is, in the words of the statute, absolutely void as against subsequent purchasers, it seems to me that the principle of that is a reasonable one, viz., that one so purchasing in good faith without notice, ought to be protected against a prior purchase. And if I had not been referred to that case, I should have thought that anyone purchasing with notice or knowledge of a prior purchase was not a purchaser in good faith, for whose protection the statute was passed.

It is not material for me to express any opinion upon the question, because, in the first place, I am controlled by authority, and, in the second place, I am not able to find the fact that the plaintiff had actual notice of the prior purchase at the time he made what I may call the subsequent purchase, and he therefore was a subsequent purchaser in good faith.

Now, a purchaser in good faith is nowhere defined to be one who obtains actual or immediate delivery with actual and continued change of possession. I cannot read those words, found in one section, into another section so as to

enlarge the provisions of section 6, and, for the reason I have given, I do not feel inclined to do so, because I think anyone making a *bonâ fide* purchase ought to be protected against a prior purchase which was not accompanied by the formalities required by the statute; otherwise the protection of the statute would be of little avail.

I am, therefore, compelled to find that the plaintiff, being a subsequent purchaser in good faith, for a valuable consideration, was entitled to regard the prior purchase by the defendant as absolutely void, and was entitled to hold the property as against the defendant; and the defendant, setting up his title to the property under a contract said by the statute to be absolutely void, is unable to sustain his contention against the plaintiff's claim.

The plaintiff's claim is for the value of the goods. Two witnesses, as far as I can judge independent witnesses, placed the value of the goods at \$1,200 and \$1,250, respectively. The defendant placed the value at \$1,000. They had been treated by him in prior partnership dealings as worth \$1,600. I think on this evidence I must assess the value of the goods at \$1,200, and there must be judgment for the plaintiff for that sum and costs.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 23rd and 24th of March, 1899.

E. E. A. DuVernet, for the appellant. The plaintiff was not, in fact, a purchaser in good faith; but, assuming that he was, he did not comply with the provisions of the Act, and neither party having a statutory title, the defendant's prior equitable title must prevail: *Marthinson v. Patterson* (1891), 20 O. R. 720; (1892), 19 A. R. 188; *Morrow v. Rorke* (1876), 39 U. C. R. 500; *Fisken v. Rutherford* (1860), 8 Gr. 9.

J. C. Haight, for the respondent. The defendant has failed to shew that the plaintiff had any knowledge of the agreement between Meyer and the defendant when

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ROSE, J.

Argument. the plaintiff made his agreement. The plaintiff is therefore a subsequent purchaser in good faith, and as against him the defendant's agreement is void. Even if he had knowledge, his position would not, however, be affected. Compliance on the part of the subsequent purchaser with the provisions of the Act is not required: *Hamilton v. Harrison* (1881), 46 U. C. R. 127; *Hall v. Collins Bay Rafting and Forwarding Co.* (1884), 12 A. R. 65; *Moffatt v. Coulson* (1860), 19 U. C. R. 341; *Tidey v. Craib* (1883), 4 O. R. 696.

DuVernet, in reply.

June 29th., 1899. The judgment of the Court was delivered by

OSLER, J.A. :—

I think the appeal should be dismissed.

I have read the evidence carefully, and it was very thoroughly discussed by Mr. DuVernet and Mr. Haight on the argument of the appeal.

One cannot avoid entertaining some suspicion that the plaintiff's conduct was not entirely innocent in the matter of the purchase; but I am unable to say that the learned Judge was wrong in holding that he had no actual notice of the defendant's prior purchase when he made his own.

He is found to be a subsequent purchaser in good faith and for valuable consideration, and the defendant's prior purchase not being registered and not having been accompanied by the immediate delivery followed by an actual and continued change of possession of the articles sold which the statute requires, is, as against him, absolutely void under section 6 of the Act. As against such a subsequent purchaser I do not find either reason or authority for saying that the prior purchaser can invoke the requirements of the Act which he has himself omitted to comply with. The Act avoids the one, but the other stands good, just as the former would have done, except as against the subsequent *bonâ fide* purchaser.

If, as against the plaintiff, there is no one who answers that description, his title, which may be said to be a statutory title, stands good as against the defeated prior title of the defendant.

Judgment.

OSLER,
J.A.

Appeal dismissed.

R. S. C.

DUNN V. PRESCOTT ELEVATOR COMPANY.

Warehouseman—Negligence—Damages—New Trial.

In an action against the owners of a grain elevator to recover damages for alleged negligence in the care of grain one of the grounds of negligence found by the jury was that the grain had been taken into the elevator from the vessel while rain was falling and that the vessel's hatches had not been protected :—

Held, that the responsibility of the defendants did not commence till the grain was delivered to them ; that therefore there was no duty cast upon them to protect the grain during the process of unloading ; and a general assessment of damages having been made upon this and other grounds of negligence, a new trial was ordered.

Judgment of FALCONBRIDGE, J., reversed.

APPEAL by the defendants from the judgment at the trial. Statement.

The following statement of the facts is taken from the judgment of MACLENNAN, J.A. :—

The defendants are the owners of a large elevator at Prescott, and their business is the receiving of cargoes of corn and grain from lake vessels into their bins, storing it for a longer or shorter time, and then discharging it into barges for conveyance down the St. Lawrence to Montreal.

The action is for negligence in receiving two cargoes of corn belonging to the plaintiff, and caring for the same while in the defendants' bins ; the first cargo being of 50,000 bushels received on the 22nd of April, 1897, from the steamer Niko, and the other of 63,000 bushels from the steamer Nicaragua, on the 24th of April ; both cargoes

Statement. having been shipped at Chicago, for Montreal. The damage complained of is that the corn became heated, and so greatly impaired in quality and value, while in the defendants' bins; and it is not disputed that much of it was in that condition when discharged therefrom.

The case made by the plaintiff in the first instance by his statement of claim was: First, that his corn was dry and in good order and condition when received by the defendants from the vessels, and that the elevator had been built in a period of sleet and snow, of green and unseasoned timber, and was in an unfinished and leaky condition when the corn was stored therein, whereby it became heated and damaged; second, that after the heating was discovered the defendants permitted it to remain in the bins without turning it over often enough to check or stop the heating; and third, that the defendants permitted the plaintiff's corn to be mixed with other corn in a heated condition, and substituted heated and damaged corn, belonging to other persons, for the plaintiff's corn.

The statement of claim was amended after the defence was filed by also charging that the defendants unloaded the cargo of the *Niko* in a heavy rain, and when elevating it permitted it to get damp and wet, whereby it became heated in the bins, and damaged; and that the defendants mixed the heated corn with the sound grain, whereby a large quantity was damaged.

At the trial the charges were confined to the unloading of the *Niko's* cargo in a heavy rain, and the neglect to turn both cargoes over in the bins with sufficient frequency. All the other charges were abandoned.

The case was tried at Ottawa, on the 13th of January, 1898, and the four following juridical days, before FALCONBRIDGE, J., and a jury, and the following were the questions submitted to, and the answers returned by, the jury:—

Was the corn, by reason of being stored in vessels, more subject to heating than it otherwise would have been?
No.

Did the cargo of the Nicaragua sustain injury owing to the gale encountered on the passage? No. Statement.

Did it rain during the time the Niko's cargo was being discharged into the elevator; and, if so, between what hours, and to what extent? Yes; from about 8 o'clock until the cargo was discharged; moderate rain.

If yes, did the rain that fell affect the corn to any appreciable or injurious extent? Yes.

If you find that it was so injured, state by what opening the rain fell on it? The hatches.

Did the corn received from either vessel become heated and out of condition? Yes.

And if so, how much? 76,586 bushels.

To what extent was the corn injured? To the extent that it was not fit for export.

To what do you attribute the heating of so much of the corn as you find was out of condition? From rain and want of proper care while in the elevator.

Was it from its inherent qualities? No.

Or from some unascertained cause? No.

Or from its storage in the vessels? No.

Or from any injury during its passage from Chicago to Prescott? No.

Or any moisture received while being elevated? Yes.

Or from want of ordinary and reasonable care of the corn while in defendants' charge? Yes.

Did the defendants take ordinary and reasonable care of the corn while in their charge? No.

If not, in what respect did they fail to do so? From not turning it over often enough.

If the plaintiff is entitled to recover, at what sum do you assess his damages? \$8,610.13. Wiser lot, \$2,498.13, difference between 17 and $27\frac{9}{16}$. Norwegian lot, \$1,514.87, difference between 16 and $27\frac{9}{16}$. Torrhead lot, \$4,597.13, difference between 16 and $27\frac{9}{16}$.

Upon these findings the learned Judge gave the following judgment in the plaintiff's favour.

Judgment. FALCONBRIDGE, J. :—

Falconbridge,
J.

Mr. McCarthy's strongly urged and very formidable contention that the ship and not the elevator was responsible for the damage resulting from rain wetting the corn while it was being discharged into the elevator cannot now affect the result, in view of the finding of the jury that the heating was attributable both to the rain and want of reasonable and proper care of the corn while in the defendants' charge.

I do not think I am at liberty here to substitute measures of damage differing from those which the jury thought proper to adopt, but I must leave these considerations for a higher Court.

Judgment for \$8,600.13 and costs.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 8th and 9th of December, 1898.

Osler, Q.C., and *French*, Q.C., for the appellants. The findings of the jury are not justified by the evidence; there was no negligence on the part of the defendants. The deterioration complained of—a chemical change in the grain—was something the defendants could not have guarded against by the exercise of reasonable care, and reasonable care is all that they are bound to exercise: *Beven on Negligence*, 2nd ed., p. 998; *Story on Bailments*, 9th ed., sec. 444; *Cailiff v. Danvers* (1792), 1 Peake 114; *Page v. Daffoe* (1894), 24 O. R. 569; 21 A. R. 466; *Wilmot v. Jarvis* (1855), 12 U. C. R. 641. *Brabant v. King*, [1895] A. C. 632, is relied on, but it is distinguishable. There was in that case a defect in the warehouse. There must at least be a new trial. The defendants are not responsible for the wetting of the *Niko's* cargo, which should have been delivered to them by the vessel in good order: *Carver on Carriage of Goods*, 2nd ed., sec. 462; *Ford v. Cotesworth* (1868), L. R. 4 Q. B. 127; (1870), L. R. 5 Q. B.

544. The assessment of damages cannot, therefore, stand. Argument.
In any event the damages are excessive.

Leitch, Q.C., and *D. W. Saunders*, for the respondent. The evidence supports the jury's findings, and the judgment founded upon those findings is right. The defendants could have refused to accept delivery of the Niko's cargo in the rain, but, having assumed the risk, they were bound to protect the grain while being unloaded: *Thomas v. Day* (1803), 4 Esp. 262; *Abbott on Shipping*, 12th ed., p. 324; *Edwards on Bailments*, 3rd ed., sec. 343. Then, knowing that the grain was damp, they were bound to exercise more than ordinary care to prevent heating. That is a danger which always requires to be guarded against, and the defendants should have taken the well-known precautions to prevent it. The damages are not excessive.

Osler, in reply.

June 29th, 1899. The judgment of the Court was delivered by

MACLENNAN, J.A. :—

The finding of the jury in effect is that about half of the Niko's cargo was damaged, and the whole of the cargo of the Nicaragua with the exception of 10,000 bushels, and the verdict against the defendants is for the whole of the damages, estimated at the difference between the value of the corn in a sound state at Prescott, and its value when delivered out to the plaintiff from the elevator.

One question which was discussed at the trial, and which was pressed upon the learned Judge, was whether the defendants were responsible for the damage which the jury found had resulted from unloading the cargo of the Niko while rain was falling. In his judgment the learned Judge says that question could not affect the result in view of the finding of the jury that the heating was attributable both to the rain and want of reasonable and proper care of the corn while in the defendants' charge,

Judgment.
MACLENNAN,
J.A. and that he does not feel at liberty to substitute measures of damage differing from those which the jury thought proper to adopt. With great respect I am unable to agree with this view of my learned brother. The jury have clearly included in their verdict the damage which they say was caused by discharging during the rain as well as the damage arising from subsequent want of care and have not distinguished between the two, and if the defendants are not answerable for both, the verdict cannot stand.

It is therefore necessary to consider whether the defendants are responsible for the damage caused by rain, while taking in the cargo, the learned Judge having expressed no opinion upon it.

The defendants' business is the unloading of grain from vessels, storing it in great bins for a longer or shorter time, and again loading it into other vessels for further carriage. Their contract was to take care of the corn promptly upon arrival, which means, of course, to receive it and take care of it in the way of their business as an elevator company, upon its arrival in the two vessels which have been named. The method of unloading in such cases is for the ship to open a hatch, through which the elevator company lets down into the grain in the hold a long box tube, containing an endless chain of buckets, by which, when set in motion by steam power, the grain is carried up to the top of a bin seventy or eighty feet high, discharged into a hopper, in which it is weighed, and then allowed to fall into the bin, until it is full. The grain is not all drawn from one hatch. The arm or leg is moved from hatch to hatch in such a way as to keep the vessel upon an even keel, to preserve a proportional distribution of burden over the vessel, and to prevent her timbers from being strained. The unloading is done with great speed; at the rate of from 6,000 to 10,000 bushels per hour, and a large number of shovellers are employed in the hold to shovel the grain to the mouth of the leg as fast as it is carried up; and it is admitted that these shovellers do their work

at the expense of the ship, paid in the first place by the elevator company, and deducted from the freight. By the shipping note the cargoes were consigned to the order of the plaintiff in care of the defendants at Prescott, and also in care of A. G. Thompson, an agent of the plaintiff, at Montreal.

Judgment.
MACLENNAN,
J.A.

The Niko arrived at the defendants' wharf about 4 p.m., on the 22nd of April, and the unloading began almost immediately, at 5.05, and was continued with three or four intervals until 3 a.m. next morning, when the unloading was complete. The working time was eight hours and twenty minutes, and the average rate of unloading was about 6,000 bushels per hour. The weather was fine when the unloading began, but the jury find that it began to rain about eight o'clock, and rained moderately from that time until the unloading was complete. They also find that the grain was injured by the rain which fell upon it through the hatches while the unloading was going on. The question is whether the defendants are responsible for that damage. It was contended for the plaintiff that the moment the unloading began the defendants were responsible for the whole cargo, that it had then been delivered by the ship to, and had been received by, the defendants. No authority was cited for that proposition, and it is contrary to well established law; and there is no evidence that as a matter of fact the defendants assumed possession and control of the whole cargo when they commenced to unload. I think it is well settled law that it is duty of the master to unload, and that his responsibility for the goods continues until he has delivered them safely over the rail of the ship, and into lighters furnished by the consignee or upon the dock as the case may be. Another mode of unloading may be by cranes, operated by the consignees, or as in the present case by the arm or leg of an elevator, and in such cases, the duty and responsibility of the ship ceases when the goods are taken hold of by the crane, and by the buckets of the elevator; and then only as to so much as has thus been

Judgment. taken hold of: *Ford v. Cotesworth* (1870), L. R. 5 Q. B. 544; Carver on Carriage of Goods, 2nd ed., sec. 462; MACLENNAN, *Thomas v. Day* (1803), 4 Esp. 262; Abbott on Shipping, 12th ed., p. 324; *Coggs v. Bernard*, 1 Sm. L. C., 10th ed., at p. 199. I think, therefore, it was the duty of the captain to see that the cargo received no damage from rain while under his control, by keeping the hatches closed and taking whatever other precautions were necessary; and if he gave it to the leg of the elevator in a wet condition it was his fault, and not that of the defendants.

He was delivering the cargo as the agent of the plaintiff, and, so far as the defendants are concerned, it is as if the plaintiff himself had so delivered it.

The jury have estimated the damages in three sums—so much on the Wiser lot, so much on the Norwegian lot, and so much on the Torrhead lot. Now, the Wiser lot and the Torrhead lot were composed partly of the Niko and partly of the Nicaragua cargoes, and not having distinguished between the damage by rain and the damage by not turning over, the findings in respect of those two lots cannot stand, but must be the subject of a new trial.

The damage of the Norwegian lot, which was composed wholly of Nicaragua corn, is not affected by the finding of damage by rain. That arose wholly, according to the finding, from want of proper care while in the elevator from not turning it over often enough. It is to be observed, upon the damages assessed by the jury with respect to this lot, and the observation is equally applicable to the other lots, that they have found the defendants liable for the difference between the value as sound corn and its value when delivered out by the defendants, in other words making them responsible for the whole deterioration in the value of the corn after coming into the elevator. I think that was plainly wrong.

[The learned Judge dealt with the evidence as to turning the corn, and continued:]

These are the conclusions at which I have arrived upon the evidence as it stands, having regard to the findings of

the jury—First, that the defendants are not liable for the consequences of receiving the Niko cargo, or part of it, in the rain; second, they are not responsible for the damage to the grain in bin 49, except so far as it could have been cured or prevented by subsequent more frequent turnings; third, they can not be held responsible for any damage whatever to the corn shipped by the Fanny; fourth, they are not responsible for damage to the remaining bins, except so far as it could have been cured or prevented by more frequent turnings after the 4th of June.

Judgment.
 MACLENNAN,
 J.A.

It is, of course, impossible to say what complexion the case may assume upon another trial, either as to the fact of damage, or its extent, or as to the proper measure of the damage to the Wiser lot, and it is, therefore, inexpedient to discuss the evidence further.

I think there should be no costs of the last trial to either of the parties, and that the defendants should have the costs of this appeal.

Appeal allowed.

R. S. C.

SMITH V. SMITH.

Contract—Specific Performance—Parent and Child—Agreement to Compensate—Improvements.

AN appeal by the defendant from the judgment of a Divisional Court, reported 29 O. R. 309, was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 9th of May, 1899, and on the 29th of June, 1899, was dismissed with costs, the Court agreeing with the reasons for judgment given in the Court below.

Statement.

W. R. Riddell, for the appellant.

G. W. Wells, Q.C., for the respondent.

R. S. C.

WILSON V. MANES.

Municipal Elections—Returning Officer—Refusal to give Ballot Paper to Voter—"Wilful Act"—Absence of Malice or Negligence—Consolidated Municipal Act, 1892, sec. 168.

A returning officer at a municipal election refuses at his peril to give a ballot paper to a person on the voters' list claiming the right to vote, and willing, if required, to take the prescribed oath. The officer's refusal in such case is a wilful act within the meaning of section 168 of The Consolidated Municipal Act, 1892, and renders him liable to the voter for the statutory penalty without proof of malice or negligence.

Johnson v. Allen (1895), 26 O. R. 550, not followed.

Judgment of a Divisional Court, 28 O. R. 419, affirmed, MACLENNAN, J. A., dissenting on the ground that on the evidence there was no refusal of the ballot paper.

Statement. THIS was an appeal by the defendant from the judgment of a Divisional Court, reported 28 O. R. 419, and was argued before BURTON, C.J.O., OSLER, MACLENNAN, and LISTER, J.J.A., and FERGUSON, J., on the 30th and 31st of January, 1899. The facts are stated in the report below.

W. E. Middleton, for the appellant.

Aylesworth, Q.C., for the respondent.

June 29th, 1899. BURTON, C.J.O.:—

It is manifest that the plaintiff was entitled to vote, and that if requested to take an oath he was entitled to select for himself any one of the forms contained in sections 102 to 105 inclusive, but I agree with the majority of the Judges in the Court below that there was no request of any candidate or his authorized agent that an oath should be administered.

What appears to have occurred was this. Although the plaintiff's name appeared upon the voters' list, it would seem that he had been assessed as tenant, and after the final revision of the assessment roll he had ceased to be tenant, though he still resided in the town and had become possessed of real property as a freeholder, and was a freeholder of a property of sufficient value to qualify him to vote at the time of the election.

When the plaintiff went into the booth to vote, his vote was objected to on the ground that he was not a tenant, which he admitted, but claimed he was owner and demanded a ballot, adding that he was prepared to take the owner's oath, and a good deal of discussion arose as to his right to take the oath at all.

He then informed the defendant that he had taken legal advice upon it. The defendant, however, insisted that if he appeared on the assessment roll as a tenant he could give him no oath but the tenant's; and the agents, knowing perfectly well that he could not take that, did not insist upon his doing so, and he again demanded a ballot.

The idea of the defendant was apparently that the plaintiff was not entitled to vote as a freeholder. In this he was clearly wrong. As the learned Chief Justice of the Common Pleas Division remarks, the policy of recent legislation has been to have all questions of qualification settled before or at the time of the revision of the voters' list, and to make the revised voters' list conclusive as to the right of everyone named therein to vote, subject to his taking, if required to do so, the prescribed oath.

I think the proper interpretation of the word "wilful," as found in this Act, is that put upon it by Bowen, L. J., in *In re Young and Harston's Contract* (1885), 31 Ch. D. 168, where he says: "That is a word of familiar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally, as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent." See also *Regina v. Senior*, [1899] 1 Q. B. 238.

That the action of the defendant was wilful here admits of no doubt. He was shewn the opinion the plaintiff had received, but he persisted he could give no other than the tenant's oath, which he knew full well that the plaintiff

Judgment.

BURTON,
C.J.O.

Judgment.

BURTON,
C.J.O.

could not make; so that instead of the plaintiff refusing to be sworn, it was a case of a returning officer refusing to administer the oath which the voter was willing to take, or in other words, refusing to give a ballot for an insufficient reason.

I think it was a wilful act in contravention of the Act within section 168, and that the plaintiff is entitled to the penalty of \$400 fixed by that section. The Chief Justice, for fear of a possible failure of justice on some technical ground, has assessed the damages at Common Law at a similar amount, not intending that both sums should be levied, and there is some difficulty in entering the formal judgment, as the \$400 given as a penalty by the statute is in addition to any other penalty or liability to which the defendant may be subject. I think, therefore, the damages at common law should be nominal only in accordance with the intention of the trial Judge, and that the judgment so varied should be affirmed.

OSLER, J. A. :—

I am of opinion that the judgment of the learned Chief Justice at the trial is substantially right and that the plaintiff is entitled to recover the penalty mentioned in the 168th section of the Municipal Act of 1892 from the defendant, who, being a returning officer at a municipal election, was guilty of a wilful misfeasance or of a wilful act or omission in contravention of section 143 of the Municipal Act.

The plaintiff had demanded a ballot. He had not, as I read the evidence, been "required to take the oath." He had not refused to take the oath. Therefore the returning officer could not properly have made the entry in the poll book mentioned in section 143 (5), *i.e.*, "Refused to be sworn." Nor was such an entry made in fact, though the officer made some other wholly unauthorized and impertinent entry. Therefore there was nothing to have prevented the returning officer from giving to the voter the

ballot he had demanded. True it is that a discussion had arisen about the oath, not after any request had been made that the voter should "take the oath," but on a volunteered statement of the voter that he was prepared to take the owner's oath. The returning officer refused to allow the voter to take any oath but one of his own choosing, unless he would take an oath which he had no lawful authority to prescribe. That was not a requiring of the voter to "take the oath," the only requisition that could lawfully have been made, the voter having the choice. Nothing, therefore, in law intervened between the demand of the plaintiff for the ballot and the duty of the defendant to deliver it to him. He omitted or refused to deliver it because the plaintiff would not take an oath which the Act did not require of him, and which, as the defendant well knew, he could not have taken.

Judgment.

OSLER,
J.A.

There was, therefore, a refusal by the defendant, as returning officer, to deliver a ballot to the plaintiff, who was on voters' list and appeared to be entitled to it. Was that a wilful misfeasance or wilful act or omission in contravention of the section?

The refusal was "deliberate and intentional, not accidental or inadvertent, but so that the mind of the defendant went with the act": *Regina v. Senior*, [1899] 1 Q. B. 283, 291. See also *per* Bowen, L. J., *In re Young and Harston's Contract* (1885), 31 Ch. D. 168. In that sense it was wilful, beyond a question.

But the defendant says that the word "wilful" must receive some qualification: *Actus non facit reum nisi mens sit rea*, and although he refused the ballot he thought he was right in doing so, and thus the wicked mind or intention was wanting. I should myself have been disposed to hold that the evidence does not admit of this benevolent view of his conduct, but, as the learned trial Judge has not so held, I shall content myself with briefly explaining why I think that this contention is no answer and that the defendant is within the danger of the Act if his act or omission in contravention of the section was wilful in the

Judgment.

OSLER,
J.A.

sense above mentioned, whether he intended to do something wrong or not.

In *The Queen v. Tolson* (1889), 23 Q. B. D. 168, the question in what cases the guilty intent must be shewn, and in what a man must take care to obey a statutory enactment at his peril was very much considered and the numerous and apparently diverse authorities on the subject examined. In the judgment of Wills, J., is laid down what seems to be a reasonable test, although the circumstances, in any given case, may make it difficult of application. "Although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. In such cases * * the Acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril. Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable."

Now in this case we see that the duties of the returning officer at the poll, prescribed by section 143, clauses 2 to 8 inclusive, marginally noted as "recording," "oath," "objection," "refusal to take the oath," "deputy returning officer to mark ballot paper and voters' list," "delivery of paper to voter," and "to explain mode of voting," are ministerial only. The returning officer is required to exercise no judgment or discretion, but is simply to do the thing commanded by the Act. His course is clearly marked out for him, he incurs no risk if he follows it. The object of the Voters'

Lists Act and the relative provisions of the Municipal Act as to the proceedings at the poll, is to make the list conclusive as to the right of the person named therein to cast his ballot upon his complying with any demand which may have been lawfully made upon him to take the oath. If the vote is objected to the objection is noted and its validity, of which the officer is not to be the judge, can be enquired into elsewhere, while if he refuses the vote it is lost and can never be added to the poll.

Judgment.

 OSLER,
J.A.

The nature of the sanction under stress of which the officer acts is also proper to be considered. It is not disqualification or disfranchisement or any degrading punishment, but is a pecuniary penalty only large enough in the opinion of the Legislature to warn him of the danger of disobedience. Furthermore, it is to be noted that his misfeasance or act or omission is not described as an offence or by any degrading epithet, *e.g.*, "wilfully and corruptly," nor does the language of the section denote or import by its own terms any corrupt mind or intent or anything but a mere act of the will: *Regina v. Badger* (1856), 25 L. J. M. C. 81. Under all these circumstances it seems to me that we need not look for reasons to mitigate the force of the expression "wilful" where the officer, knowing the facts, deliberately refuses on whatever ground to do the thing commanded to be done by him. In *Pickering v. James* (1873), L. R. 8 C. P. 489, one of the causes of action was for the penalty imposed by section 11 of the Ballot Act, 1872 (Imp.), from which the section of our Act is taken: see 38 Vict. (O.) ch. 28, sec. 31 (1874). None of the Judges who decided that case suggests that the defendant's breach of duty involved anything more than the intentional non-compliance with the requirements of the Act.

So far as what I have said is opposed to anything which may have been expressed in the case of *Johnson v. Allen* (1895), 26 O. R. 550, which I have read and carefully considered, it will be seen for the reasons which I have given that I am unable, with all respect, to follow that decision. Nor do I think that the decisions in what may be called the

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contract cases, *In re Young and Harston's Contract* (1885), 31 Ch. D. 168; *In re Mayor of London and Tubbs' Contract*, [1894] 2 Ch. 524; *In re Woods and Lewis' Contract*, [1898] 2 Ch. 211, afford safe guides as to the proper meaning to be attached to the word "wilful" in a case of this kind.

I am, therefore, of opinion that with a slight variation the judgment at the trial is right and ought to be affirmed. The plaintiff sues as he has the right to do (see *Pickering v. James*), as well for the penalty imposed by section 168 as for a cause of action as at Common Law. The recovery for the latter should be limited to nominal damages in accordance with the intention of the trial Judge that no more than \$400 should be recovered on the whole record. With this variation the appeal should be dismissed with costs.

The cases of *Young v. Smith* (1880), 4 S. C. R. 494; *Walsh v. Montague* (1888), 15 S. C. R. 495; *Regina v. Prince* (1875), L. R. 2 C. C. R. 154; *Parsons v. Crabbe* (1880), 31 C. P. 151; *Regina v. Tisdale* (1860), 20 U. C. R. 272; may also be referred to.

LISTER, J.A., and FERGUSON, J., concurred.

MACLENNAN, J.A.:—

It is clear that the plaintiff was entitled to vote, and that he was wrongly prevented from doing so by the defendant. The penalty imposed by section 168 is confined to violations of sections 119 to 167 inclusive; and the first question is whether what is complained of falls within any of them. It is clear that the *origo mali* was the refusal of the defendant to administer the freeholders' oath, which the plaintiff was willing and offered to take. If that was the wrong committed by the defendant, it does not fall within any of the sections from 119 to 167, but is a violation of section 106, taken in connection with section 105 (a). The majority of the learned Judges have held that there was no request within section 106 that the

plaintiff should be sworn, and that therefore the defendant had no right to require him to take any oath whatever, and that so he violated section 143 (7), by refusing a ballot. It seems not to be any part of the duty of the deputy returning officer to require a voter to be sworn. Section 106 says the oath shall be administered at the request of any candidate, or his authorized agent. I think the fair inference from the evidence is that there was such a request. The plaintiff in his evidence says that McComb, one of the agents, objected to his vote, that he asked him why, and: "He said I was not a tenant, but I was an owner, and I demanded a ballot and was prepared to take the owners' oath." Then there was a good deal of discussion between the agents, and they argued the question before the returning officer for ten or fifteen minutes. Now, with great respect, I think the proper inference from this is that there was a request by an agent that an oath should be administered. The propriety of this inference is further apparent from the statement of claim, which in two separate paragraphs alleges that the defendant refused to administer to the plaintiff the oath of qualification as a voter, prescribed by the statute in that behalf, which the plaintiff, pursuant to the said statute, selected for himself. Now, if there was a request that the plaintiff should be sworn, his vote could not be taken or received without an oath. The agent of the candidate could insist on that, and if the defendant had given a ballot and taken the vote without it, he would have incurred a penalty of \$200 under section 143 (5), and would then have violated not only section 106, but also section 143 (5). The defendant having improperly refused to administer the oath which the plaintiff had a right to take and was willing to take, no question of giving or receiving a ballot could arise. The defendant thought he had a right to refuse to administer the freeholders' oath under the circumstances. He might have been right in so doing, or he might have been wrong; but whether right or wrong, he could give no ballot without the oath. The candidate or his agent had a right to inter-

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MACLENNAN, J.A. pose and forbid his doing so, and if the circumstances were such that the plaintiff had no right to demand a ballot, a refusal could be no violation of the section.

I, therefore, think the action cannot be maintained as upon a violation of section 168, and if sustainable at all, it must be for a violation of section 106 taken in connection with section 105 (a). I think there was a clear violation of section 106. It was contended that the defendant was not liable for violation of that section, for want of notice of action and in the absence of allegation and proof of malice. I think, however, the act of administering the oath was merely ministerial and that the refusal is actionable without proof of malice: *Pickering v. James* (1873), L. R. 8 C. P. 489; and that the refusal not being an act done, the defendant was not entitled to notice of action. The plaintiff is, therefore, entitled to damages, and I think the sum of \$50 named by my brother Rose would be a sufficient sum to allow him.

Appeal dismissed, MACLENNAN, J.A., dissenting.

R. S. C.

SHERLOCK V. POWELL.

Contract—Partial Performance—Quantum Meruit.

Where there is a contract to do specified work for a fixed sum, with a proviso for payment of proportionate amounts, equal to eighty per cent. of this fixed sum, as the work is done and the balance of twenty per cent. in thirty days after completion and acceptance, completion is a condition precedent to the right to payment, and where the work is not completed there is no right to recover for the portion done as upon a quantum meruit.

Judgment of a Divisional Court affirmed.

THIS was an appeal by the plaintiff from the judgment Statement. of a Divisional Court, and was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 17th of May, 1899. The facts are stated in the judgment.

J. R. L. Starr, for the appellant.

Aylesworth, Q.C., for the respondent.

June 29th, 1899. The judgment of the Court was delivered by

LISTER, J.A.:—

I think this appeal ought to be dismissed. The plaintiff entered into a written contract with the defendant, whereby he contracted and agreed with the defendant to furnish the materials and do the work therein specified (being work in connection with certain houses of the defendant). The work was to be done in accordance with certain plans, specifications and the directions of the defendant or his agent. The plaintiff was to be paid for the whole work the sum of \$867, which sum was to be paid as follows: eighty per cent. monthly as the work was done, and twenty per cent. in thirty days after the completion and acceptance of the work. The defendant,

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before action, paid the plaintiff the sum of \$680 on account of the contract price. This action was brought under the provisions of the Mechanics and Wage Earners' Lien Act to recover the balance of the contract price and for extras. The Official Referee before whom it was tried found in favour of the plaintiff for \$166.10, a sum less than the plaintiff would have been entitled to under the contract had he performed it.

The Divisional Court, on appeal by the defendant, held on, I think, ample evidence that the plaintiff was not entitled to recover, being of opinion that he had not completed the work according to the contract, and that there was no evidence that the defendant had accepted the work as completed, or that he had waived compliance with the contract, and reversed the judgment of the Referee. The question is, whether the plaintiff is entitled under the circumstances to recover the balance of the contract price or any portion of it.

It is, I think, perfectly clear that the contract was an entire, and not a divisible contract, as contended for on the part of the plaintiff. It was a contract to do the whole work stipulated for, in consideration of a fixed sum, a portion of which under its terms was not to be paid until a period subsequent to not only the performance, but to the acceptance of the work so to be done under it. Manifestly, performance is a condition precedent to the right of the plaintiff to enforce payment of the balance of the contract price.

I agree with the Divisional Court in thinking that the evidence fails to establish that the work had been completed in conformity with the contract. It is well settled under these circumstances that the plaintiff cannot recover on the contract, nor can he recover for the price of the work actually done and the materials actually used as on a *quantum meruit*.

The old case of *Ellis v. Hamlen*, decided in 1810, and reported in 3 Taunt., at p. 52, and which has up to the present time been cited and approved in nearly every

case in which the question now under consideration has been dealt with, was an action upon a building contract to recover the balance of the sum therein agreed on, the principal part of the price having been paid. The defence was that the plaintiff had omitted to put into the building certain joists, etc. It was held that the plaintiff could not recover on a *quantum valebat* for the work, labour and materials. Mansfield, C.J., said: "The plaintiff not having performed the agreement, he must be nonsuited." And in the more modern but leading case of *Munro v. Butt* (1858), 8 E. & B. 738, which was an action to recover for work and labour done upon two houses of the defendant under a special agreement which stipulated that the whole was to be completed on a specified day to the satisfaction of a surveyor named, and which the plaintiff failed to complete, it was held that the plaintiff could not recover on the special count, not having fulfilled it; and that the fact of the defendant taking possession of his own land did not afford an inference that he had dispensed with the conditions of the special agreement under which the works were done or of a contract to pay for the work actually done according to measure and value.

The above decisions and others enunciating the same rule were cited and followed in the lately decided case of *Sumpter v. Hedges*, [1898] 1 Q. B. 673, which grew out of a contract by which the plaintiff agreed to erect certain buildings on the defendant's land for a lump sum, and after doing part of the work abandoned the contract and sued to recover in respect of the work which had been done as upon a *quantum meruit*. It was held that the plaintiff could not recover, there being no evidence of a fresh contract. It was said in that case by Lord Justice A. L. Smith: "The law is that, where there is a contract to do work for a lump sum, until the work is completed the price of it cannot be recovered. * * It is suggested, however, that the plaintiff was entitled to recover for the work he did on a *quantum meruit*. But, in order that that may be so, there must be evidence of a fresh contract to pay for the work already done."

Judgment.

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The doctrine of "substantial performance" pressed by counsel for the plaintiff, and which is held in the Courts of many of the States of the neighbouring Union, has never been adopted by the English Courts or by the Courts of this country. Mr. Hudson, in the second edition of his work on Building Contracts, vol. 1, p. 201, refers to this doctrine thus: "Where the contract is entire, and completion is a condition precedent to payment, no English case has yet decided that any allegation of 'substantial performance' will enable the builder to recover, unless there is some act of the employers, such as acceptance, waiver, or prevention, or evidence from which a contract can be implied to pay for the work as performed and according to value, although it is not entirely completed." The learned author cites the following cases in support of the text: *Munro v. Butt* (1858), 8 E. & B. 738; *Whitaker v. Dunn* (1886), 3 Times L. R. 602; *Oldershaw v. Garner* (1876), 38 U. C. R. 37. The plaintiff having failed to establish that the contract was performed or that its non-performance was owing to the fault or concurrence of the defendant, cannot, as it seems to me, on the authorities, recover in this action. See also *Appleby v. Myers* (1867), L. R. 2 C. P. 651.

The appeal must be dismissed with costs.

Appeal dismissed.

R. S. C.

McDONALD V. LAKE SIMCOE ICE AND COLD STORAGE COMPANY.

Ice—Water and Watercourses—Constitutional Law—Public Harbour.

The plaintiff was the owner of a lot bounded by the water's edge of Lake Simcoe, and also of the adjoining lot covered by the waters of that lake, there not being in the patent of either lot any special reservation of right of access to the shore :—

Held, that he was entitled to the ice which formed upon the water lot and had the right to cut and make use of it for his profit ; that no other person was entitled to cut and remove the ice except in the *bond fide* and advantageous exercise of the public easement of navigation ; and that the defendants were not exercising that easement when they cut channels through the plaintiff's ice in which to float to the shore blocks of ice cut by them beyond the limits of the plaintiff's water lot. Judgment of MACMAHON, J., 29 O. R. 247, reversed, OSLER, J. A., dissenting.

Held, also, OSLER, J. A., expressing no opinion, that the *locus in quo*, a small bay in Lake Simcoe, at which there was a wharf where, with the permission of the owner, vessels used to call, but no mooring ground and little shelter except from wind off the land, was not a public harbour within the meaning of the British North America Act, and that the plaintiff's grant from the Province was valid.

APPEAL by the plaintiff from the judgment of MAC- Statement.
MAHON, J., reported 29 O. R. 247.

The plaintiff was the owner of a water lot at Jackson's Point, Lake Simcoe, and the questions involved were, first, whether the grant to the plaintiff from the Province of Ontario was valid, the contention of the defendants being that the *locus in quo* was part of a "public harbour" ; and, secondly, whether, if the grant were valid, the plaintiff was entitled to restrain the defendants from cutting channels through the ice which formed in winter upon the lot. The facts are stated in detail in the report below.

The appeal was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 10th and 11th of October, 1898.

William Macdonald, for the appellant. The lot in question is not part of a public harbour, and the patent is valid. The bay does not form a harbour at all ; there is

Argument. no shelter except when the wind is off the land, and it is no more a harbour than any small cove or bay along the shore. The plaintiff's wharf is the only thing that makes it of any use even as a landing place, and, apart from the general right of navigation, the public have no right to resort to it. The question as to what constitutes a "public harbour" within the British North America Act was raised, but not decided in the *Fisheries Case* (*Attorney-General for Canada v. Attorneys-General for Ontario, Quebec, and Nova Scotia*, [1898] A. C. 700); but from what is said there it would seem that the Judicial Committee think there must at least be some public right involved. In Nova Scotia, in *Fader v. Smith* (1885), 18 N. S. Rep. 433, a landing-place of the kind now in question was held to be a public harbour, but this case only assumed to follow *Holman v. Green* (1881), 6 S. C. R. 707, which has in the *Fisheries Case* not been accepted as well decided. Under this patent all proprietary rights in land and water have passed to the plaintiff, and there is outstanding merely the public easement of navigation. It is not correct to say that there is no right of property in water: Hall on the Sea Shore, 2nd ed., pp. 1 to 7, p. 42 (n) p. 194; Hale, chs. 3, 4 and 5 (in appendix to Hall); Phear, pp. 41, 53; and the reservation in the patent does not limit the proprietary right: *Warin v. London and Canadian Loan and Agency Co.* (1885), 7 O. R., at p. 725; *Ratté v. Booth* (1886), 11 O. R., at p. 497. *The Queen v. Robertson* (1882), 6 S. C. R. 52, recognizes this right. See also *Beatty v. Davis* (1891), 20 O. R. 373; *Marshall v. Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732; American and English Encyclopædia of Law, vol. 16, pp. 246, 253. It is only in water in public use that there can be no private right of ownership. This is what is referred to in *Lyon v. Fishmongers' Company* (1876), 1 App. Cas. 662. An outsider has no right to the water or to the ice: see Articles 30 Cent. L. J. 6, and 37 Cent. L. J. 357. The reservation in the patent has no special significance. There might under some circumstances be a right to travel over the ice when

public waters are frozen, but that is not the same right as the right of navigation, and is not paramount to private rights of ownership: *French v. Camp* (1841), 18 Me. 433; *Woodman v. Pitman* (1887), 79 Me. 456; *Carvell v. Charlottetown* (1876), 2 P. E. I. Rep. 115, at p. 129. In the present case there is no right to travel over the ice; much less to cut it. *Cullerton v. Miller* (1894), 26 O. R. 36, is a decision in favour of the right to cross the water lots on the ice, but even this is going too far. A right of navigation is nothing more than a right of way: *Orr-Ewing v. Colquhoun* (1877), 2 App. Cas., at pp. 873-74, and is suspended while there is ice: *Lorman v. Benson* (1860), 8 Mich. 18; *State v. Pottmeyer* (1870), 33 Ind. 402; *People's Ice Co. v. Steamer Excelsior* (1880), 44 Mich. 229; *Washington Ice Co. v. Shortall* (1881), 101 Ill. 46; *Hogg v. Beerman* (1884), 41 Ohio St. 81. See also R. S. O. ch. 288, sec. 9.

R. U. Macpherson, and *G. C. Campbell*, for the respondents. This bay is, in fact, a harbour, and a public harbour if there is any distinction, and the provincial patent is void: *Holman v. Green* (1881), 6 S. C. R. 707. At any rate, the reservation in the patent prevents the plaintiff from complaining. There is, moreover, no right of property in water, and there is no distinction between water in a stream and water in a lake; in each case it is moving and changing, and ownership is impossible. There must be some appropriation to constitute a title: *Wright v. Howard* (1823), 1 Sim. & S. 190; *Regina v. Meyers* (1853), 3 C. P. 305, at p. 347; *Kensit v. Great Eastern R. W. Co.* (1883), 23 Ch. D. 566, at p. 569. In none of the American cases cited was there a reservation, and in some of them special legislation applied. *Rowell v. Doyle* (1881), 131 Mass. 474, throws much light on the subject. Even if the reservation refers only to the right of navigation, it is fatal to the plaintiff's case. This is, without doubt, navigable water and the right of navigation cannot be interfered with: *Queddy River Driving Boom Co. v. Davidson* (1883), 10 S. C. R. 222; and the defendants have the right to use all the navigable portion, and are not confined

Argument. to particular channels: *Williams v. Wilcox* (1838), 8 A. & E. 314, at p. 349; though they have, in fact, reasonably and carefully cut channels only. The right of navigation is paramount and the soil under the water can be to such extent as is necessary used: *Attorney-General v. Wright*, [1897] 2 Q. B. 318; *Clendinning v. Turner* (1885), 9 O. R. 34; *Attorney-General v. Harrison* (1866), 12 Gr. 466, and any obstruction, even one forming naturally, may be removed. *Washington Ice Co. v. Shortall* (1881), 101 Ill. 46, relied on by the appellant, turned on the fact of appropriation of the ice, and was not a case of cutting for the purpose of navigation. Bringing the ice along the channels is navigation, just as much so as putting it on a boat and bringing that boat along the channels: Angell, 7th ed., p. 696; *Moore v. Sanborne* (1853), 2 Mich. 519. The respondents are riparian owners and are entitled as such to access to the water and to use it for all purposes.

Macdonald, in reply.

June 29th, 1899. BURTON, C. J. O. :—

The case is one of great importance, not only to the parties concerned but to the public generally, the gathering of ice as an article of commerce having of late years assumed very large proportions and there being a large amount of capital invested, and upon the further ground that it is important to define what passes under a grant of a water lot in the ice business, but before dealing with that question we have to deal with a very formidable objection which has been raised to the plaintiff's title, it being alleged that the *locus in quo* was part of a public harbour within the meaning of the British North America Act. If it was a public harbour it follows, as of course, that the patent under which the plaintiff claims is wholly void and inoperative. Upon this, as well as on the general question, it may not be easy to find many decisions for our guidance.

The Judicial Committee expressed the opinion that it

was very inconvenient that a determination should be sought of the abstract question what falls within the description "public harbour," and they declined to attempt an exhaustive definition of the term applicable to all cases, and in the case of *Holman v. Green* (1881), 6 S. C. R. 707, in the Supreme Court, it was assumed that the Summerside Harbour fell clearly within the definition of a public harbour. As little doubt, I imagine, could have been entertained, if the question had arisen in the case of the Toronto harbour, and in that case the learned Chief Justice was mistaken in supposing that there had not been a large expenditure of public money upon it as a harbour. It does not strike me that the harbours referred to were restricted to those which at the time of Confederation had been artificially constructed or improved at the public expense. Take for instance, the harbour at Halifax: No one, I fancy, would question that before the expenditure of a dollar upon it that natural harbour would under the terms of the Act have passed to the Dominion, but the difficulty I feel is in holding that under the evidence in this case it ever was a harbour at all.

No doubt when the wind was in a certain direction vessels could obtain protection under the shelter of the shore, but when in another direction there was no shelter whatever; on the contrary, there was not only no protection, but very great danger of the vessels running ashore, and if once in, great difficulty in getting out again. There was, no doubt, some sort of wharf or landing place on the shore at which steam-boats would land their passengers and goods, but to my mind the evidence falls far short of establishing that this at the time of Confederation could be regarded as a public harbour within the meaning of the Act.

Assuming, therefore, that this was not a public harbour, within the meaning of the Act, what was the effect of the grant of the water lot by the Provincial Government?

It is now the well established rule in this country to apply the term "navigable" to all streams which are in fact

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navigable, and in such cases to limit the title of the adjoining owner to the edge of the stream, and the same rule applies also, as I understand it, to the waters of the lakes. It is, and has been, the practice of the Crown Lands' Department in granting patents of the shore to grant merely to the water's edge.

In all such cases, the title to the soil being in the Crown, and the stream being a public highway, the public would have a right to fish, which could not be interfered with unless under legislative authority, and the right to the ice in such a case would be in the general public and the first taker would be entitled to hold it.

But there is a third case, that of non-navigable streams, in which the title to the soil is in the riparian owner *usque ad filum aque*, and in such case the owner is entitled absolutely to the fish, and over such a stream the public have no rights of highway when once frozen over.

In such a case it seems to me that the exclusive right of the owner to take the ice formed over his land is an analogous right to the right to the fish, and in the same way as the owner of the bed of the stream he would have a clear right to forbid any person when the stream itself is frozen from driving over it and treating it as a highway.

An American Judge, in speaking of the Common Law rule as to right of fishery, uses this language: The doctrine of the Common Law, as I have stated it, promotes the grand ends of civil society by pursuing that wise and orderly maxim of assigning to everything capable of ownership a legal and determinate owner, and may not this well apply to what has now become a merchantable commodity of great value.

In a case of *Woodman v. Pitman* (1887), 79 Me. 456, no question of private right such as arises here was involved, but the question arose between persons claiming the right to harvest ice and the right of others travelling upon the ice, and it was held that both were natural or common rights, and that those who first took possession were entitled to their enjoyment without interference from

other persons, but I do not think the Court in that case regarded the travelling on the ice as at all equivalent to the paramount right of navigation possessed by the public when the waters were open ; on the contrary they disclaim any such idea. " It is an error, we think," says the Chief Justice, " to invest the right of passing on the ice in all places with the same degree of importance as that which attaches to the right of vessels in navigable waters. It may be an offshoot of the navigable right, something akin to it, but a right of a secondary or inferior degree. The idea of roads over the frozen surface of rivers was never broached in the old Common Law—it has grown up since—and should be the superior right or not, according to circumstances." As regards navigable rivers and the great lakes, the law, as I understand it, both with respect to the soil under them and the right of reasonable use for all lawful purposes, including fishing, fowling, boating, bathing, skating, and the taking of ice, is that these are *publici juris*, and the same has been held to apply in some of the States to great ponds except when restricted by legislation. In the absence of legislation the only restriction upon their enjoyment by the public is that no one shall interfere with the reasonable use of them by another person equally entitled.

What then is the effect of the present grant, assuming it to be a valid grant under the statute? It was not intended to be a mere barren right to the land. I should imagine that it would confer upon the purchaser all the rights that would pass under a grant of a lot of land through which a non-navigable stream passes, including the exclusive right to fish, so that when it ceased to be navigable, by reason of its being frozen over, he could either exercise that right or grant it to others. If this, but for the recent legislation, would be the right construction, it goes very far I think to solve any difficulty about the ice.

In 1860 doubts apparently had been entertained as to the power of the Crown to dispose of and grant water lots

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in the harbours, rivers, and other navigable waters in Upper Canada, and to set at rest any question which might arise in reference thereto, it was declared and enacted that it had been theretofore, and that it should be thereafter, lawful for the Governor-in-Council to authorize sales or appropriations of such water lots under such conditions as it had been, or it might be, deemed requisite to impose. This was re-enacted after Confederation with the additional proviso that it was not to interfere with the use of any harbour as a harbour, or with the navigation of any harbour, river, or other navigable water. This, of course, was deemed necessary in consequence of navigation having been in the meantime placed under the exclusive jurisdiction of the Dominion Parliament.

But for the legislation passed in 1897, I should have thought that, under the patent in this case, the exclusive right to the fish found upon this lot would have passed to the grantee in the same way as I apprehend that the fish in a non-navigable stream would pass to the owner of the soil, but although the legislation adopted in sec. 47 of 60 Vict. ch. 9 (O.), is unusual and exceptional, it can admit of no doubt that a patent whenever issued, either before or after its passage, would not, unless an exclusive right of fishing were expressly granted, be deemed to carry or include the exclusive right of fishing in the navigable waters which cover or flow over the land so granted.

I should have supposed that a grant of the land would have passed everything upon the land *usque ad cælum*, and that when the Legislature recognized the right of the Crown to make a valid grant of the land it meant the grant to convey and include everything incident to it unless excluded.

The Legislature has, however, now declared a different rule, but I do not think it should affect our decision. They have now declared that fish shall not pass unless expressly granted, but this restriction should not be extended to anything which would ordinarily pass under a grant of the land, for instance a growth of reeds or rice beds or

other natural products at certain seasons of the year of great value, in which I think should be included ice formed upon the lot itself.

Judgment.

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C.J.O.

I am of opinion, therefore, that the defendants were not justified in interfering with the plaintiff's property, and that the appeal should be allowed, with a reference as to the damages in case the parties are unable to agree.

MACLENNAN, J. A.:—

In the year 1819 the Crown granted to one Bouchier, in fee, a tract of land in the township of Georgina, abutting upon Lake Simcoe, its northern boundary being expressed in the patent to be the water's edge of the lake. By mesne conveyances one Miller became the owner of the westerly portion of this land, having a water frontage of about thirty chains measured along the shore, which is an irregular curve, the curvature being inwards towards the land, forming a bay.

On the 2nd of October, 1878, the Ontario Government, in consideration of \$49, granted to Miller, 12 $\frac{2}{5}$ acres, described as a water lot in front of the land of which he was then the owner as above mentioned, the lakeward boundary being a straight line, and the other boundary being the water's edge; what was thus granted being the bay already mentioned, roughly semicircular in form and about ten chains in width at its widest part from the shore lakewards. This grant was subject to a condition requiring the grantee to sell to the Lake Simcoe Junction Railway Company a defined portion of the same water lot, amounting to 1 $\frac{73}{100}$ acre, whenever required by that company, at a named price. The grant also contained a proviso saving, excepting and reserving to the Crown "the free uses, passage and enjoyment of, in, over and upon, all navigable waters that shall or may be hereafter found on or under, or be flowing through or upon any part of the said parcel or tract of land hereby granted as aforesaid." By deed poll, dated the 29th of November following, Miller,

Judgment.
MACLENNAN, J.A. in consideration of \$357, granted to the railway company 2 82/100 acres, being the part of the water lot mentioned in the patent, and also the land required for the line of railway to connect with the water lot. The water lot conveyed to the railway company did not extend into the lake as far by two or three chains as the lot granted to Miller. The railway company afterwards built a wharf upon the north-west side of the water lot, and extended their tracks upon it. By the deed poll Miller covenanted with the railway company that he had a good title to the lands conveyed. On the 2nd of January, 1895, the Grand Trunk Railway Company, which had in the meantime become entitled to all the rights of the Lake Simcoe Junction Railway Company, made a lease for five years to the defendants the ice company, of a part of the land, and the land covered with water, acquired by the Lake Simcoe Railway Company from Miller, lying south and east of their track and wharf, the part so leased being about 100 feet in width and 150 in length, 75 feet of the length being upon the shore and the remaining 75 feet extending into the water. The lease was taken by the defendants for the purpose of erecting store houses for ice, and to enable them to carry on their business of dealers in ice. On the 11th of January, 1896, Miller conveyed the land, and land covered by water, owned by him, to the plaintiff, with certain exceptions not material to be mentioned, and excepting also the land and the land covered with water which he had conveyed to the railway company.

The present action was brought on the 2nd of February, 1897, and it is to recover damages from the defendants for trespass, and for an injunction. The trespass complained of is that the defendants, for the purpose of conveying to their store houses blocks of ice which they had cut on the lake, outside of the limits of the bay or water lot granted to Miller, opened a channel in the ice within the bay leading to the water leased by them from the railway company, and floated the blocks through the channel

thus opened. In making the channel the defendants sank the ice cut within the plaintiff's water, under the adjoining ice, to put it out of the way. The plaintiff contends that the ice of the bay within the limits of the grant of the 2nd of October, 1878, and outside of the water granted to the railway company, belongs to him, and that the defendants have no right to cut it, or even to pass over it.

Judgment.
MACLENNAN,
J.A.

The first question for consideration is whether the bay in question is a public harbour within the meaning of section 108 and schedule 3 of the British North America Act. If it was a public harbour on the 2nd of October, 1878, when the patent of that date was granted by the Ontario Government to Miller, the grant must be held to be *ultra vires* and void: *Attorney-General of Canada v. Attorneys-General of Ontario, Quebec, and Nova Scotia* (1896), 26 S. C. R. 444; [1898] A. C. 700, following *Holman v. Green* (1881), 6 S. C. R. 707. If that is the proper conclusion the case becomes very simple: both parties being riparian proprietors have equal rights in the water, and the plaintiff can have no right to complain of the defendants for what they have done in cutting and storing ice. The learned Judge has decided that the bay is a public harbour, and having done so has dismissed the action.

I have not been able to satisfy myself that my learned brother's conclusion is right. The question what constitutes a public harbour was discussed to some extent in the *Fisheries Case*, by the Lords of the Privy Council, but they expressly abstained from an attempt at an exhaustive definition. They went so far, however, as to say that the execution of public works therein, was not an essential element, and that the foreshore might not in every case be part of the harbour.

In *Holman v. Green* (1881), 6 S. C. R. 707, Ritchie, C. J., gave a number of reasons for holding that the bay at Summerside, P. E. I., was a public harbour, and the present Chief Justice, Sir Henry Strong, in the same case said that he could conceive no other meaning to be attached to the words "public harbour," standing alone, than that of har-

Judgment. bours which the public have a right to use. We are, therefore, without any authoritative definition of what a public harbour is, within the meaning of the Act, unless we are prepared to hold that every little indentation of the shore of the sea, or of the inland lakes, is a public harbour within its meaning. I think this bay does not answer the description. It is merely a small bay, roughly semicircular, or semi-elliptical, in form, about 308 yards wide at the mouth and 132 yards across at the centre. The essential quality of a harbour is shelter for vessels and craft navigating the sea or the lakes. It is a place where they may lie in safety from storm and tempest. This bay is so widely open to the lake, and of so small an extent, that the shelter it could afford would be very little more than any other part of the shore. The shore itself affords shelter from a storm blowing off the land, and this bay would afford no shelter from a storm blowing from the lake except from the west. The statute was dealing with the harbours of the whole Dominion, including some of the great harbours of the world, both on the sea coast, and in the great lakes and rivers, and it calls them "public harbours." I cannot think Parliament meant to include in this expression every little bay like the present, where the owner of the adjacent shore had erected a wharf as a place of call for passing vessels.

If the place be not, as I think it is not, a public harbour, then the grant of the Crown in 1878 to Bouchier was good, and vested in him the soil and freehold of the bay subject to the public right of navigation. As we have seen the grant made to the railway company did not extend as far out as the plaintiff's grant, and the defendants' lease does not go as far as the railway company's land. The plaintiff, therefore, owns the soil and freehold of the water for some distance outside of the defendants' water, and it is over that that the alleged trespass was committed. Now, applying the maxim *cujus est solum, etc.*, the plaintiff must be taken to possess in and over this land covered with water all the rights of any other owner of land, subject

only to the public right of navigation. The grant made to the railway company was for a wharf, and other railway purposes. The wharf is evidently for the purpose of taking in and delivering out goods, that is, goods coming in and going out by water, by means of navigation, and I think in no way extends the meaning or effect of the deed. The question between the plaintiff and the defendants, therefore, seems narrowed down to this, whether what the defendants have done and are doing is an exercise of the right of navigation over and in the plaintiff's soil and freehold, and I do not think it is.

It must be conceded that if, after ice had formed in this bay, a vessel desired either to get away from, or to approach, the railway wharf for any legitimate purpose, the captain could break or cut the ice in order to do so. So also it may be conceded that the right of navigation extends to the floating of logs and timber either in rafts or smaller quantities. But it seems absurd to say that bringing blocks of ice to the shore in midwinter, either over the surface, or through channels cut for the purpose, is navigation. I do not think it is. I think the solid ice which forms in winter upon the plaintiff's freehold is the plaintiff's property, just as the soil beneath and the air above, or rather the space occupied by the air, are his and can not be invaded or interfered with by others, except in the exercise of the right of navigation: *Orr-Ewing v. Colquhoun* (1877), 2 App. Cas. 839; *Harrison v. Duke of Rutland* (1893), 1 Q. B. 142.

I am, therefore, of opinion that the plaintiff is entitled to judgment and that the appeal should be allowed.

Moss, J.A. :—

The respondents in this appeal asserted, and assumed the burden of shewing, that at the date of the issue of the grant by the Crown Lands Department of Ontario of the water lot in respect of which the appellant claims to maintain his action, the said water lot was part of a public

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harbour at Jackson's Point, and that the grant was therefore invalid.

The learned trial Judge did not determine this question in the respondents' favour, but for the purposes of his decision assumed that there was not a public harbour at Jackson's Point.

The patent, issued on the 2nd of October, 1878, is a grant of the water lot in front of lot No. 2 in the 9th concession of Georgina, as described by metes and bounds.

As appears from a certified copy of the description contained in the grant of lot No. 2, the patent therefor issued on the 16th of October, 1818, and the description of the lot carries it to the water's edge of Lake Simcoe.

The same thing appears with reference to other lots fronting on the bay or inlet in question. None of the grants contain any reservation of the right of access to the shore by the public.

The bay or inlet is not landlocked or nearly so. It is an indentation of the shore of Lake Simcoe caused by a headland or point jutting out in a northerly direction and sloping gradually to the water's edge at a distance of about 800 feet from the mainland, with a shoal stretching some distance further into the lake.

In the course of settlement of the back country, Jackson's Point (known in early days as Bouchier's Point) became a place of call for the steamboats plying on the lake, the passengers being apparently at the first landed by means of a gangway put out from the steamboat to a few logs piled on the shore. Later on a wharf, occupying the present situation of the plaintiff's wharf, was built by his father, and, by arrangement between him and the steamboat proprietors, passengers and freight were landed upon it.

This wharf afforded some shelter to vessels, but in certain winds there was no shelter and vessels would not enter. There was really no shelter from northerly or easterly winds until the railway company built its wharf, in 1879 or 1880, after the issue of the patent for the water lot.

Even with the railway wharf, the steamboats would not enter when the wind was in certain directions and the weather was stormy. This has continued to be the condition of things ever since the issue of the patent. But before that time this place was no more than a place of call for vessels, affording a somewhat precarious shelter in certain winds, but none at all in certain others. It could not be called a port, or even a place of call for vessels in the nature of a port, where certain things are provided for their use, such as moorings and buoys.

I therefore think the learned trial Judge rightly assumed that there was a valid grant of the water lot in question.

Besides being the owner of the water lot, the plaintiff is the owner as well of the township lot fronting on Lake Simcoe in front of which the water lot is situate, and the question does not arise whether his rights depend on riparian ownership or on the position of grantee of the soil covered with water:

In this case, even more completely than in that of *Ratté v. Booth*, the plaintiff has vested in him all the right of property possessed by the Crown in the land and water subject to the public easement. The shore, the bed, and the water, are vested as private property in the plaintiff, subject to the servitude of a common public right of way for the purposes of navigation: *per* Boyd, C. (1886), 11 O. R., at p. 497.

The right of the public is merely the right of navigation, and the right of navigation is simply a right of way. The public have no property therein, but the mere right to use the water for the purposes of navigation, similar to the right the public may have to pass along a public road or foot-path over a private estate: *Orr-Ewing v. Colquhoun* (1877), 2 App. Cas. at pp. 846, 854, 868, 871.

The right of the public in such a highway does not extend to the use of the soil or anything growing upon it, for any other purpose: *Harrison v. Duke of Rutland*, [1893] 1 Q. B. 142; *Regina v. Pratt* (1855), 4 E. & B. 860; *Dovaston v. Payne* (1795), 2 H. Bl. 527.

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J. A.

Ought it not to follow that the ice which in the course of nature forms in winter upon the plaintiff's water lot is his property, which he alone has a right to cut and make use of for his profit? And is not any other person cutting or removing it a trespasser, liable as such, unless he is able to justify his acts upon the ground that they were advantageous to the public easement of navigation?

As might naturally be expected, the question of property in ice has been the subject of much discussion in the Courts of some of the American States. And in many well reasoned cases the right of a proprietor of soil covered with water to the ice formed over it in winter has been affirmed.

Moreover, in those States in which the law as to riparian rights is the same as ours, it has been held that a riparian proprietor has a property in the ice in front of his ripa.

In *Washington Ice Co. v. Shortall* (1881), 101 Ill. 46, it was held that the owner of land on both sides of a navigable fresh water stream was entitled to the unlimited use and appropriation of the ice as his exclusive property. It was argued for the defendants, who had entered upon and cut the ice without going upon the plaintiff's land on either bank of the stream, that a riparian owner on the banks of a river navigable in fact had no property in the ice formed in the middle of the stream, where he had done nothing to pond or separate it, but that any person might, as against such riparian owner, where he could gain access without passing over the shore or banks of the owner, enter upon the ice and remove the same.

But these positions were denied by the Court saying: "It would not be in the interest of peace and good order, nor consist with legal policy, that such an article should be held a thing of common right, and be left the subject of general scramble leading to acts of force and violence."

Many rights, such as the right of fishing, which consist with the public right of navigation, are conceded to the proprietors of the soil covered with water, and there seems no good reason for making an exception in the case of ice.

The ownership of the subjacent soil *primâ facie* carries with it the right to everything above and below it. Judgment.

In *Brookville Hydraulic Co. v. Butler* (1883), 46 Am. Rep. 580, this principle was applied to the case of ice under somewhat peculiar circumstances. A canal company had acquired the right to overflow the land of an adjoining proprietor with water. The question was, to which party did the ice formed upon the pond created by the overflow belong? The pond was not shewn to have been a reservoir basin of the canal, nor to have constituted any part of the channel. All that could be inferred from the use of the low ground by the canal company was that there existed a right to overflow it. The Court held that the ice belonged to the owner of the servient estate. It said (p. 583): "Easements do not take from the owner of the fee the right to make any profitable use he can of his property not inconsistent with the enjoyment of the dominant estate." Many authorities, English and American, are referred to, and amongst others the old case of *Goodtitle v. Alker* (1757), 1 Burr. 133, from which is quoted the statement that "the owner of the soil has a right to all above and under ground, except only the right of passage for the King and his people."

Moss,
J.A.

The respondents scarcely disputed these propositions, but contended that what they did was but the removal of an obstruction to their navigating the navigable highway over the plaintiff's water lot.

The learned trial Judge gave effect to this contention and held that the appellant had no cause of action.

It is necessary to see what the respondents did and the circumstances under which they did it.

Lake Simcoe is a body of water from thirty-five to forty miles long, with a width in some places of twenty miles.

In the months of January and February, 1897, this large body of water was completely frozen over and there was not a vessel of any kind upon it, except those laid up for the winter at the various winter harbours.

The respondents, between the middle of January and

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the first of February, went upon the lake outside of the appellant's water lot and commenced cutting and harvesting ice for the Toronto market. They had an arrangement with the Grand Trunk Railway Company under which they had erected an ice house alongside of the railway tracks, close to the shore of the lake and at the shore end of the railway wharf. From this ice house there is an inclined plane up which the blocks of ice are forced by means of a derrick.

In order to get the ice to the foot of the inclined plane, the respondents cut several channels, each six feet in width, through the ice on the appellant's water lot, and pushed the ice so cut out under the ice field. Along the channels thus made the respondents' men, with poles, pushed to the shore the blocks of ice cut by the respondents out in the lake.

The effect was to render it impossible, or at least dangerous, for the appellant or any one to cross the water lot, and the ice crop was destroyed.

Now, if this was a proper exercise by the respondents of the right of navigation, the appellant has no cause of complaint.

But, with much deference, I am unable to come to the conclusion that these acts were acts of navigation or of removing obstructions to navigation to which the appellant was bound to submit.

Regard must be had to the circumstances of the country and the climate.

Generally speaking, navigation has relation to water in a condition to bear and freely float upon its surface vessels or floatable substances which are capable of being propelled by wind, steam, or oars, over or through it, and of moving freely from place to place as directed.

It implies free and open water in seasons when vessels of every kind are free to come and go upon it. That is the general character of navigable water and of navigation upon it.

But in respect to Lake Simcoe, having regard to the

rigour of the climate and its usual effect upon the water, there can be and is no such thing as navigation in the usual and proper sense of the term during the winter season.	Judgment. <hr/> Moss, J.A.
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Through the action of the cold, navigation is at an end over the whole lake, and for the water, through which during the season of navigation vessels may pass and gain and enter the ports on the lake, there is substituted a solid surface of ice.

Upon and over this there may be travel in vehicles or on foot or on ice-boats or skates. That which was a navigable highway has been transformed by the hand of nature into a roadway.

The ice is not properly to be called an obstruction or impediment to navigation, so as to justify the removal of a small portion of it, not for the purpose of admitting a vessel to or from a port, but for an entirely different purpose.

It seems to me to be putting an altogether too strained meaning upon navigation to apply it to the process of shoving blocks of ice, cut on the immense field of the lake, through channels cut in the ice field of a neighbouring proprietor of water lots.

The effect of cutting the channels was not to open up the navigation of the lake, or to give access by the public to the port in course of navigation of the lake. The general public were not thereby restored to the use of the navigable waters of the lake, and no one has suggested that the respondents' acts were done with that intent.

It was suggested that there would be nothing to prevent the respondents or any one of the public from keeping a tug constantly running all the winter in a channel and thereby keeping it open, and that if that was lawful the cutting of the channel after the formation of the ice should be lawful also.

But, apart from the physical difficulty, not to say absolute impossibility, of keeping a channel open in the manner suggested, unless the operations of the tug were

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Moss,
J.A.

being conducted for the purposes of navigation, in the proper sense of the term, the act would not be justifiable if it caused damage to another's ice fields. This was determined in *People's Ice Co. v. Steamer Excelsior* (1880), 44 Mich. 229, in which the respective rights of vessel owners and owners of ice fields on a navigable river were very fully considered and discussed.

The respondents were in my opinion guilty of an act or acts of trespass upon the appellant's property.

It was argued that the appellant was estopped by reason of the sale by his grantor to the railway company of a portion of the water lot pursuant to a condition to that effect contained in the patent. I see nothing in the instrument conferring upon the railway company or the respondents the right of trespassing upon the appellant's water lots. If they were upon it and using it in the exercise of the right of navigation they were entitled to do so as part of the public. But if they were there otherwise than in the exercise of the right of navigation their right if any, was to cross over the surface of the ice, not to cut or destroy it.

There is no agreement that the railway company or any person claiming under it was to be at liberty to cut channels through the appellant's ice, to be found in or implied from the grant of the water lot to the company, and the company's rights as riparian owner would not extend to that.

The appellant is entitled to an injunction restraining the trespasses complained of. As to damages it appears to have been agreed between the appellant and respondents' counsel that in the event of the former being found entitled to relief it should be referred to the Master to ascertain the amount.

The respondents should pay the costs of the appeal.

LISTER, J. A. :—

I am of the same opinion.

OSLER, J. A. :—

Judgment.

OSLER,
J.A.

I would dismiss this appeal for the reasons given in the judgment of MacMahon, J., in the Court below and in that of Rose, J., in *Cullerton v. Miller* (1894), 26 O. R. 36.

Appeal allowed, OSLER, J. A., dissenting.

R. S. C.

BICKNELL V. GRAND TRUNK RAILWAY COMPANY.

Railways—Connecting Lines—Negligence—Passenger—Cattle Drover—Free Pass.

A contract was made by a railway company for the carriage of cattle to a point on the line of a connecting railway company at a fixed rate for the whole journey. The contract provided that the shipper (or his drover) should accompany the cattle; and that the person in charge should be entitled to a "free pass," but only "on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind on the part of the company or their servants":—

Held, that the condition was valid and could be taken advantage of by the connecting railway company, who therefore were not liable to the shipper for injuries suffered by him in a collision caused by their servants' negligence.

Hall v. North-Eastern R. W. Co. (1875), L. R. 10 Q. B. 437, applied.
Judgment of Rose, J., reversed.

APPEAL by the defendants from the judgment at the trial. Statement.

The following statement of the facts is taken from the judgment of OSLER, J. A. :—

The action is for personal injuries sustained by the plaintiff in consequence of a collision on the defendants' line of railway in the course of a journey from Napanee to Montreal on the night of the 6th of November, 1897.

It was conceded that the collision was caused by the negligence of the defendants' servants.

Their defence is that the plaintiff was travelling upon a free pass and upon conditions which exempted them from liability under the circumstances.

Statement. The plaintiff was a dealer in live cattle and had been accustomed to ship cattle by rail from his place of business to Montreal and elsewhere.

On the 6th of November he shipped a car load of twenty-three cattle from Erinsville, a station on the Bay of Quinté Railway and Navigation Company's line, to Montreal, a station on the line of the Grand Trunk Railway Company. The former company connects with the Grand Trunk Railway Company at Napanee, which is its northern terminus, and the car in which the plaintiff's cattle were, was, on its arrival at Napanee, attached to a freight train of the latter company to be taken from thence over their line to Montreal. The plaintiff accompanied it on its journey from Erinsville as the man in charge of the cattle. He was in the caboose at the rear of the train, which had proceeded for some distance on its way to Montreal, when it was run into by another train of the defendants following it, and the plaintiff sustained very serious injury by the collision.

The plaintiff testified as follows :

You met with an accident on the Grand Trunk Railway last fall ? Yes.

How were you travelling ? In charge of stock.

Taking a car load of stock from Erinsville to Montreal ? Yes ; on the Bay of Quinté Railway and the Grand Trunk.

When did you leave your home ? About six o'clock.

On what day of the week ? Saturday, the 6th, about six o'clock at night.

That is going down to Napanee first, did you ? Yes.

By train ? Yes.

And were your cattle on the same train ? Yes, I met them at Camden East ; I took charge of them there.

At Napanee did you transfer to the Grand Trunk ? Yes ; it was put on a freight train here, my car was.

* * * * *

How long prior to the date of this accident had you been in Montreal with cattle ? I had been in almost every week or so, sometimes twice a week.

Can you give me the dates? I could not.

Statement.

How long had you been making these trips to Montreal? I should judge I had been making them every week, or every two weeks at the outside.

With hogs or cattle? Hogs and cattle both.

You went down for the purpose of selling? Sometimes I had them sold, sometimes I went down for the purpose of delivering them and doing business for the store.

And you were familiar with shipping? Yes sir, familiar.

And you knew, of course, that the railway passed you free, attending to the cattle on certain conditions? Well, I understood—

You knew that from your contract; you were familiar with shipping? I was familiar with shipping, but I expected I paid enough for that pass.

You know how the contracts read? Yes; I always understood they were no good.

Nevertheless, that is the way you travelled? Yes.

You travelled free in consideration of your not having a claim if you were injured? Well, I did not take that consideration.

That is what you signed? Probably the railway company took that consideration, but I did not, I always understood from what legal advice I had that those contracts would not hold water.

That is another matter. The railway company carried you free on condition of their being free from liability to action? I always thought they charged enough in freight.

They charge for the cattle, they don't charge for the man? Well, in their way of putting it.

That is the way the contract reads. Well, you knew that was the course of business. And how many cars had you on this trip? I had one car that I was in charge of.

How many cars did you own on this trip? I owned two when I started from home, I put one car in Dr. Wray's charge.

Did you own that car? I owned it after it got to Montreal.

Statement. Had you bought the cattle? Yes.

You owned the cattle? I gave them to him in a way, gave them in his charge, they were shipped in his name.

If you have two car loads of cattle how many men are passed free for two car loads? One man if they are shipped from the same station.

Now, where did Dr. Wray join you? At Napanee.

And you put Dr. Wray in charge of one car load? Yes.

And that gave him a free pass to Montreal? Yes, that is the rule that has been in vogue on the Grand Trunk.

Was Dr. Wray a cattleman at all, or was that just simply a way of giving him a pass? Acting as a cattleman.

And could you tell me about the number of car loads of cattle and hogs you put through in a year? I don't know that I could now tell you the exact amount; 150 or 200 cars, I would think, of live stock; some weeks we ship one or two cars, sometimes five or six cars, sometimes seven or eight cars.

* * * * *

It was proved that a Canadian joint freight classification, taking effect on the 1st of September, 1897, approved by Order-in-Council, was adopted by the defendants and the Bay of Quinté Railway and other railway companies containing the following regulations as to carriage of live stock:—

“Live stock will only be carried at the owners' risk, to be loaded, unloaded and fed by owners at their expense and under the following regulations. In car loads full actual weight should be charged for, but not less than the following minimums (see notes A. and B.):—

Cattle, 20,000 lbs., class 9, car load. Note A.—Horses and cattle when not weighed at shipping points to be billed at 22,500 lbs., subject to correction at scale points, but not less than 20,000. Note B.—In case horses and cattle cannot be weighed, an estimated weight of 22,500 lbs. will be charged.

Owners or drovers may be taken free on the same

train with their live stock in consideration of their assumption of the risk and obligations mentioned in the contract to be signed by them and under the following conditions: One, two or three cars, one person; four, five or six cars, two persons; seven, eight, nine or ten cars, three persons; over ten cars, four persons. Statement.

Return passes will not be given."

The evidence does not shew the highest freight tariff which might lawfully have been charged by these companies, but it was proved that what was actually charged was much less than that.

The plaintiff appears to have paid \$42.38, of which \$3 was a special charge for shunting at Napanee, where two calves were taken on the car, and the difference, \$4.35, was an additional charge in consequence of the load being heavier than the usual car load.

A shipping note signed by the plaintiff was delivered to the Bay of Quinté Railway Company, and he received from the agent of that company a shipping receipt in the same terms, of which the material parts are as follows:—

"Received from R. F. Bicknell, the undermentioned property in good order, addressed to R. F. Bicknell, Montreal, to be sent by the company subject to the terms and conditions stated above and upon the other side and agreed to by the shipping note delivered to the company at the time of giving this receipt therefor.

No. pieces, 23. Species of goods, cattle. G. T. R., 7447. Owner's risk. Pass man in charge."

Among the "General notices and conditions of carriage," printed on the back of the receipt note under this heading, were the following:

"10. That all goods addressed to consignees at points beyond the places at which the company have stations, and respecting which no direction to the contrary shall have been received at those stations, will be forwarded to their destination by public carriers or otherwise, as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them; or

Statement. they may, at the discretion of the company, be suffered to remain on the company's premises, or be placed in shed or warehouse (if there be such convenience for receiving the same), pending communication with the consignees, at the risk of the owners as to damage thereto from any cause whatsoever. But the delivery of the goods by the company will be considered complete, and all responsibility of the said company shall cease, when such other carriers shall have received notice that said company is prepared to deliver to them the said goods for further conveyance; and it is expressly declared and agreed, that the said company shall not be responsible for any loss, misdelivery, damage or detention that may happen to goods so sent by them, if such loss, misdelivery, damage or detention occur after the said goods arrive at said stations, or places on their line nearest to the points or places which they are consigned to or beyond their said limits.

* * * * *

17. Live stock must be fed by the owner, or at his expense, while in transit; and is taken entirely at his risk of loss, injury, damage, and all other contingencies, whether in loading, unloading, conveyance or otherwise, and under the conditions contained above. All live stock shall be carried by special contract only, and upon the following conditions of carriage:—

(1) The owner of animals undertakes all risks of loss, injury, damage, and other contingencies in loading, unloading, transportation, conveyance or otherwise howsoever, no matter how caused.

(2) The railway company do not undertake to forward the animals by any particular train, or at any specified hour, neither shall they be responsible for the delivery of the animals within any certain time, or for any particular market.

(3) When free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, default or misconduct of any kind, on the part of the

company or their servants, or of any other person or persons whomsoever, causing or tending to cause the death, injury or detention of any person or persons travelling upon any such free passes, and whether such free passes are used in travelling on any regular passenger train, or on any other train whatsoever; the person using any such pass takes all risks of any kind, no matter how caused." Statement.

At the foot of this was written and signed by the plaintiff, as to another car which he was shipping at the same time, "Please deliver to W. Coad, also my other car of cattle, of which I have not the bill."

At the same time was signed in duplicate by the agent and Bicknell another document in the following terms (so far as material):—

"The Bay of Quinté Railway and Navigation Company.
Erinsville Station, Nov. 6, 1897.

Special contract for the transportation of ordinary live stock.

Received from R. F. Bicknell: number and description, G. T. R. 7447, 23 cattle.

To be transported from Erinsville, Ont., to R. F. Bicknell, Montreal, Que.

Ordinary rates as fixed by tariff approved by Order-in-Council. Reduced rate \$39.38.

CONDITIONS OF CONTRACT.

* * * * *

2. All other live stock of all kinds will only be received for carriage on the shipper or owner signing in duplicate this special contract, one copy of which will be handed to the shipper.

* * * * *

5. The owner or shipper takes all risk of loss on the company's own lines except damage arising from any negligence or omission of the company or its servants, but the owner or shipper taking all risks of loss or damage to the said property from any cause whatsoever, so far as this company is concerned, which may happen off the company's own lines.

Statement

6. The stock shall be loaded, unloaded, fed, watered, and otherwise cared for while on the cars of the company by the shipper or owner, and at his sole risk and expense.

7. The company will only act as the agent of the owner or shipper in handing the said stock over to connecting carriers where the destination to be reached is beyond their own lines, and all connecting carriers taking charge of and transporting the said stock to destination shall be entitled to the benefit and protection of the provisions of this contract.

* * * * *

9. In case of any claim for any loss, damage or injury to any animal or animals carried under this contract, consigned to places beyond or off the company's line of railway, and which are claimed to have happened or been suffered while said animal or animals were being conveyed on this company's railway, no such claim shall be allowed or paid unless the owner or shipper shall within twenty-four hours after the car or train carrying such animal or animals shall have passed off the company's railway on to the line of the connecting carrier have given to this company's station agent nearest the point or place where said car or train passed on to the line of said connecting carrier a notice in writing with a full statement of said injury or damage and the particulars thereof and failure to do this shall be taken as a waiver by the shipper or owner of any such claim and shall bar the same.

10. It is further agreed that where any such property is consigned to a point or place on the company's own railway and that any injury or damage is suffered thereto, then and in that case the company shall not be liable for any loss or damage which may be done to the said stock while on their line unless a written notice with the full particulars thereof is delivered to the company's station agent at the point of delivery within twenty-four hours after the said property or some part of it has been delivered.

* * * * *

12. The shipper or owner hereby admits that his attention has been called to the higher and lower rates above named ; that he has and hereby does elect to accept the lower rate, and in consideration thereof he has entered into the provisions of this contract and that the whole contract is hereby declared to be embraced herein for all and every purpose. Statement.

13. It is further agreed that where the higher rate is elected and that the company take the whole common law liability for injury or accident, however caused, the values given above shall be taken as the full value of the animals and no greater sum than those mentioned above shall be payable by the company for any loss or injury or damage done to any such property. The difference between the higher and lower rates merely being that in the case of the higher rate the company take the full common law liability, and that amount shall be considered for all purposes as the absolute value of the same, and in the event of the lower rate being accepted they are to be exempt from all risks whatsoever except such as arise from the negligence of their servants. In all cases the rate charged and paid shall indicate the extent of the risk taken by the company. But in no case shall the company be responsible for any loss, injury or damage to the said property which may happen thereto while off the company's lines and out of their actual possession.

CONDITIONS OF PASS FOR PERSONS IN CHARGE OF LIVE STOCK.

When free passes are given to persons in charge of animals it is only on the express conditions that the railway company are not responsible for any negligence, default, culpable misconduct or otherwise on the part of the company or their servants or any other person or persons whomsoever which causes or tends to cause death, injury or detention of persons with such free passes and whether such free passes are used in travelling by any regular passenger or by any other train whatever."

Statement. On the so-called duplicate of this instrument the charges entered correspond with the amount in the way-bill, and it is signed by some one professing to act for the plaintiff.

It may be noticed that the two rates, ordinary and reduced, are not filled in. A single sum is mentioned, filled between the lines.

A "through freight way-bill from Erinsville to Montreal *via* Napanee," identifying the car as described in the shipping note and receipt, and bearing the same date, accompanied it.

This document shews the proportion and amount of the net freight payable to each company, of which \$25.88 and \$3, the charge for shunting at Napanee, are paid to the Grand Trunk Railway Company, and \$13.50 to the Bay of Quinté Company. Of this amount under the heading "Paid on" is "acknowledged \$38." The balance is probably referred to by the words in "collect account, \$4.38 26/11." The weight and rate are set forth as 22,500 lbs. 17½, and at the foot is written, "Pass man in charge."

The action was tried at Napanee on the 26th of April, 1898, before ROSE, J., and a jury. The damages were assessed by the jury at \$5,000, and upon the question of liability the learned Judge, on the 27th of July, 1898, gave the following judgment.

ROSE, J. :—

The defendant company by its statement of defence admitted that the plaintiff was rightfully where he was at the time of the accident, and that the injury to him was caused by negligence of its servants. It further alleged that the plaintiff was being carried in pursuance of the terms of his contract with the Bay of Quinté Railway and Navigation Company, and that it was entitled to the benefit of the terms of such contract; and in effect pleaded exoneration by contract.

The jury assessed the damages at \$5,000. All other

questions were, as I understood, to be disposed of by myself as trial Judge.

Judgment.

ROSE, J.

The contract in this case was made by the plaintiff with the Bay of Quinté Railway and Navigation Company for the carriage of twenty-three head of cattle from Erinsville station, in Ontario, to the city of Montreal. The line of such railway does not extend to Montreal, and the greater portion of the way the cattle were carried by the defendant company on its own line.

The plaintiff accompanied the cattle for the purpose of superintending their loading and unloading and conveyance.

By the contract between the plaintiff and the Bay of Quinté Company it was provided, by the terms of the 17th clause of the agreement endorsed upon the receipt note, that "When free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind, on the part of the company or their servants, or of any other person or persons whomsoever, causing or tending to cause the death, injury or detention of any person or persons travelling upon any such free passes, and whether such free passes are used in travelling on any regular passenger train, or on any other train whatsoever; the person using any such pass takes all risks of every kind, no matter how caused."

It will be observed that this clause merely exempts the contracting company from liability and does not refer at all to the defendant company.

The result of the decision in *Grand Trunk R. W. Co. v. McMillan* (1889), 16 S. C. R. 543, following *Bristol and Exeter R. W. Co. v. Collins* (1859), 7 H. L. C. 194, is that the contract here was with the Bay of Quinté Company, and not with the defendant company.

See the judgment of Strong, J., 16 S. C. R., p. 550. It is also clear that even though there was no contract between the plaintiff and the defendant, the defendant would on the admitted facts be liable to the plaintiff for

Judgment. injuries arising from negligence of its servants, unless
ROSE, J. exonerated by express terms of contract: *Jennings v. Grand Trunk R. W. Co.* (1887), 15 A. R. 477, especially at pp. 483-485; and see *Grand Trunk R. W. Co. v. McMillan*, at p. 557.

As I have said, there was no contract between the plaintiff and the defendant at all, as I read the authorities to which I have referred. As appears from the pleadings, the plaintiff was being carried under some arrangement between the Bay of Quinté Company and the defendant. The fact that he was being carried free, if it was a fact, would make no difference, as appears from the *Jennings* case. But I do not think there is any evidence that he was being carried free. I should find, as a fact, that the consideration that he paid for the carriage of the cattle included his own carriage or the carriage of some person in charge of the cattle. For, by clause seventeen, above referred to, it was necessary for the plaintiff himself, or some one under his direction, to travel with the cattle to take charge of them, as will appear from the directions therein contained. [The learned Judge read clause 17 and continued:]

It is perfectly manifest, I think, and I should find as a fact that the cattle would not have been delivered for the purpose of carriage had not the company agreed to some one going along with them for the purpose of looking after them. It was as much a part of the contract that the plaintiff, or some one on his behalf, should go with the cattle, as it was that the cattle should be carried by the company.

I do not see anything to exonerate the defendant from liability. Even could it be held to have carried the cattle and the plaintiff under the contract made with the Bay of Quinté Company, sub-clause 3 is not so worded as in terms to exonerate the defendant from liability for negligence. It is only an agreement that the Bay of Quinté Company should not be responsible for its negligence or the negligence of its servants or of any other person

or persons whomsoever. There was no agreement by the plaintiff to hold other persons or any other person free from liability for any injury that he might suffer by reason of its negligence.

Judgment.

ROSE, J.

It was said by Mr. Earls, who gave evidence on behalf of the defendant with regard to the freight arrangements, that the defendant does not carry on freight trains except on special contract; but there is no evidence of any special contract entered into between the plaintiff and the defendant, and so there is no exoneration of the defendant from liability for its own negligence.

Nor is there any evidence of any contract between the two companies by which the defendant company was to be free from liability for negligence.

But it is said that the case of *Hall v. North-Eastern R. W. Co.* (1875), L. R. 10 Q. B. 437, is a direct authority in the defendant's favour. That was a decision of the full Court, and if directly in point and not in conflict with the decisions to which I have referred, of *Jennings v. Grand Trunk R. W. Co.*, and *Grand Trunk R. W. Co. v. McMillan*, I should follow it. But there are several points of difference which I think prevent it being an authority in the present case. In the first place the contracts are not the same. I think the contract in this case is more like that in the *McMillan* case.

The terms of special contract set out in the *Hall* case do not appear in the contract between the plaintiff and the Bay of Quinté Company. It seems to me that the clause in question herein to which I have referred, is by its terms expressly confined to the agreement between the plaintiff and that company; and therefore is to be governed by the principles of decision in the *McMillan* case. But I also note the following differences between the decisions in these cases. Mr. Justice Blackburn, at p. 441, says: "As to the first question," that is the question of the liability of the North British Company, "I think the terms of the ticket did protect the North British Company from the consequences of a collision with another train of

Judgment.

ROSE, J.

that company; that, I think, was one of the risks which the plaintiff took upon himself. It is very much like the contract as between master and servant, in which the servant undertakes all the ordinary risks of the service, including risk of being injured by the negligence of other servants in the same employ."

A similar argument was advanced in the case of *Jennings v. Grand Trunk R. W. Co.*, above referred to, and Mr. Justice Osler deals with that at page 485, where he points out that there was neither a common employment nor a common service.

It seems to me the facts in the *Jennings* case afforded much more ground for the contention of a common employment and a common service than did the facts in the *Hall* case. Then again, Mr. Justice Blackburn treats the North-Eastern Company as a sub-contractor. I extract the following language:—"On the second question, the defendants, the North-Eastern Company, received the plaintiff as sub-contractors, and so took him on to Newcastle."

In the *McMillan* case, the majority of the Court (for I take it that the judgment of Strong, J., was the judgment of the majority), treated the Canadian Pacific Railway Company as the agent of the Grand Trunk Railway Company, and did not treat the Grand Trunk Railway Company as the plaintiff's agent. I extract the following clause:—"We must hold the Grand Trunk Railway Company to have contracted for the carriage of the goods to their ultimate destination, that is for the whole transitus, so far as it could be completed by railway, and the other companies, on whose lines the goods were to be carried after they left the appellants' own line, must be considered as mere agents of the Grand Trunk Railway Company, between whom and the respondent there was no direct privity of contract."

The rights and liabilities arising from a sub-contract are, of course, quite different from those arising from a contract between principal and agent.

I may point out here that there is no exoneration of any agent of the Bay of Quinté Railway Company. The exoneration is "of the company, their servants or any other person or persons whomsoever."

Judgment.

ROSE, J.

Then again, Mr. Justice Blackburn said: "There was no negligence connected with the train in which the plaintiff was, but the collision took place owing to the negligence of the defendants' servants managing the other train; and if the contract had been with the North-Eastern Company they would have been clearly protected."

Here the negligence was connected with the train in which the plaintiff was. Whether this would have made any difference with the decision, I cannot say, for I really do not see what substantial difference there is between the two cases in respect of that.

Then in the *McMillan* case, Strong, J., held that the 10th condition was sufficient to free the Grand Trunk Railway Company from liability, but treated the liability of the Canadian Pacific Railway as existing, notwithstanding the exoneration contained in the 10th condition.

It seems to me that if the *Hall* case applied, the Canadian Pacific Railway Company would by the terms of the contract have been exonerated as well as the Grand Trunk Railway Company.

There was no evidence before me of any contract between the two companies by which the plaintiff was handed over to the Grand Trunk Railway Company.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 20th of January, 1899.

Osler, Q. C., for the appellants. There was no privity between the plaintiff and the defendants and no right to recover. If there was privity as far as liability is concerned then there was also privity as far as the protection from liability was concerned. The plaintiff was taking advantage of the free pass over the defendants' line and is

Argument. bound by the conditions upon which that free pass was granted. The case is not distinguishable from *Hall v. North-Eastern R. W. Co.* (1875), L. R. 10 Q. B. 437. In any event the damages are excessive.

Aylesworth, Q. C., for the respondent. The objection that there was no privity between the plaintiff and the defendants is no answer to the action. The plaintiff when injured was lawfully on the defendants' train: he was, with the permission and assent of the defendants, being carried on their train as a passenger, and even if the defendants owed him no duty of contract, they owed him the duty not to injure him: *Austin v. Great Western R. W. Co.* (1867), L. R. 2 Q. B. 442; *Foulkes v. Metropolitan District R. W. Co.* (1880), 5 C. P. D. 157; *Jennings v. Grand Trunk R. W. Co.* (1887), 15 A. R. 477. The defendants have no contract in any way exonerating them from liability. The terms of the plaintiff's contract with the Bay of Quinté Railway and Navigation Company do not extend to the defendant company. The whole tenor of the "General Notices and Conditions of Carriage," printed on the back of the shipping receipt, shews that the words "The Company" as there used refer to the Bay of Quinté Railway and Navigation Company, and to that company alone. The special "Live Stock Contract" provides that all connecting carriers "shall be entitled to the benefit and protection of the provisions of this contract," but this contract contains nothing limiting responsibility, in the event of injury to the man in charge accompanying the cattle shipped. The case of *Hall v. North-Eastern R. W. Co.* (1875), L. R. 10 Q. B. 437, relied on by the defendants, is distinguishable. It was there optional with the shipper to send a man in charge of the animals or to send them forward alone; optional also with the accompanying drover to travel free if willing to travel at his own risk, or to pay fare as a passenger, and the language of the ticket issued to the plaintiff there was such that the Court held that the provisions of the special contract in question could not be confined to the original contracting company. The

respondent also relies on the reasons for distinguishing that case from the present one, which are pointed out in the judgment appealed from. The plaintiff here was not being carried free. The trial Judge upon the evidence so finds. The so-called "pass" issued to the plaintiff in the present case was in no sense a thing given to him as a pure gratuity. The railway companies would not receive the cattle at all without a man in charge, and the money paid to them was necessarily, therefore, consideration for the carriage of both cattle and man: *Woodruff v. Great Western R. W. Co.* (1859), 18 U. C. R. 420. In the American Courts it has been uniformly held that a shipper accompanying his live stock and riding on a drover's pass issued to him in consideration of the freight paid for his stock and in consideration of his taking care of it during the journey, is not a gratuitous but a paying passenger: *Flinn v. Philadelphia, etc., R. W. Co.* (1857), 1 Houst. (Del.) 469; *Cleveland, etc., R. W. Co. v. Curran* (1869), 19 Ohio St. 1; *New York Central R. W. Co. v. Lockwood* (1873), 17 Wall. 357; *Ohio, etc., R. W. Co. v. Selby* (1874), 47 Ind. 471; *Carroll v. Missouri Pacific R. W. Co.* (1885), 88 Mo. 239; *Delaware, etc., R. W. Co. v. Ashley* (1895), 67 Fed. Rep. 209; *New York, etc., R. W. Co. v. Blumenthal* (1896), 160 Ill. 40. There was in this case no consideration to the plaintiff for exonerating the defendants from any liability. His cattle were not carried on any reduced rate but upon payment of the full ordinary rate for merchandise of that class. There is no evidence that any choice between the ordinary and any reduced rate was given to the plaintiff, but if there had been and he had elected to pay the lower rate, the terms of his special live stock contract are only that this would exempt the company from all risks "except such as arise from the negligence of their servants," and even if the plaintiff had by express contract agreed to travel over the defendants' railway at his own risk such contract would not have protected the defendants against liability arising from the negligence of the company or of

Argument. its servants: The Railway Act, 1888, 51 Vict. ch. 29, sec. 246 (3) (D.); *Vogel v. Grand Trunk R. W. Co.* (1883), 2 O. R. 197; (1884), 10 A. R. 162; (1886), 11 S. C. R. 612; *Bate v. Canadian Pacific R. W. Co.* (1887), 14 O. R. 625; (1888), 15 A. R. 388; (1889), 18 S. C. R. 697; *Robertson v. Grand Trunk R. W. Co.* (1893), 24 O. R. 75; (1894), 21 A. R. 204; (1895), 24 S. C. R. 611; *Cobban v. Canadian Pacific R. W. Co.* (1895), 26 O. R. 732; (1896), 23 A. R. 115. The assessment of damages cannot be interfered with.

Osler, in reply.

June 29th, 1899. OSLER, J. A.:—

The plaintiff launches his action as one of tort simply, not setting up but on the contrary repudiating any contract with the defendants, and alleging that he was lawfully on their train and that the accident happened by the carelessness of their servants: *Foulkes v. Metropolitan District R. W. Co.* (1880), 5 C. P. D. 157; *Jennings v. Grand Trunk R. W. Co.* (1887), 15 A. R. 477, 483.

The question is whether there is anything in the circumstances under which the plaintiff was travelling on the defendants' railway which entitles them to say that they are exonerated from the consequences of their negligence.

It cannot be denied that the contract entered into with him by the Bay of Quinté Railway Company for the carriage of his cattle was a through contract for the entire journey from Erinsville to Montreal, subject to the lawful conditions of the shipping and receipt note and the special contract for the carriage of live cattle as above set forth, and this although a considerable part of the transit was over the line of another company, to wit, these defendants: *Bristol and Exeter R. W. Co. v. Collins* (1859), 7 H. L. C. 194; *North-West Transportation Co. v. McKenzie* (1895), 25 S. C. R. 38. And it is equally clear that the Bay of Quinté Company contracted with him in some way that he should have the right to accompany the cattle to their destination throughout the whole of the transit.

I have come to the conclusion, differing with great respect from the learned trial Judge, that what the plaintiff was to receive and what he did receive was a free pass. That was his own understanding of his dealing with the company, as may be seen from his evidence, although it is now contended that his fare was included in or was part of what he paid for the carriage of the cattle.

Judgment.

OSLER,
J.A.

No doubt the companies do refuse to transport live cattle without some person being in charge who may look after their feeding and loading and unloading, but I do not think it can reasonably be said that the fare of such person forms any element of the freight charges imposed for the carriage of the cattle. The owner or drover is "taken free" on the same train with his cattle in pursuance of the terms of the joint freight classification arrangement made by the railway companies with each other, but only on the terms of his assuming the risk and obligations mentioned in the contract to be signed by him. If he refused to sign such contract he would have to pay his fare as an ordinary passenger. If he signs it he pays nothing for his fare, but in either case the charge for freight is the same, and less than the company might lawfully charge. Apart from the special contract he had no right to travel free, and inasmuch as he did receive a pass, or was directed to be passed, and was charged and paid nothing for his passage, I think the conditions of the contract came into play and that no action could have been maintained against the Bay of Quinté Company for personal injuries which might have been sustained by him, whether on their own line or on the line of the defendant company.

Then do these conditions avail to protect the defendants from the consequences of their negligence, the accident having happened on their line during a part of the through journey? Whether they are to be regarded as sub-contractors with the Bay of Quinté Railway or as their agents to complete the carriage of the plaintiff and his cattle seems to me to make for the purpose of this case no substantial difference. A single, and so far as concerns the plaintiff,

Judgment.

OSLER,
J.A.

an undivided charge, exclusive of the special item for shunting at Napanee, is made for the through journey from Erinsville on the Bay of Quinté Railway to Montreal on the defendant railway, which the railways apportion between themselves pursuant to their own arrangements, and the first company issue the through freight way-bill covering the whole transit. That there was a traffic arrangement between the two companies under which such contracts as the one in question are made, may be inferred not only from the evidence of Earls, but also from the terms of the way-bill which have been already referred to and the direction written therein "pass man in charge."

It was strongly argued for the plaintiff that the only company exonerated, if any, was the Bay of Quinté Railway Company with which the plaintiff was immediately contracting, and which is literally the company referred to in the third clause of condition 17. But it would certainly be very strange, as Quain, J., observes in *Hall v. North-Eastern R. W. Co.*, L. R. 10 Q. B. 437, if where there is but one contract to carry a passenger on a journey on two lines the part on the one line is to be on different terms from that of the other. I do not think that case is substantially distinguishable from the present. There the plaintiff was a drover in charge of cattle accompanying them free in their transit over the defendant company's line only in virtue of a special contract made with the North British Railway Company for their carriage from Angerton on their line to Newcastle on the defendants' line. The following passage from the judgment of Blackburn, J., appears to me to apply to this case, and I can appreciate no such difference between the two contracts as to make its citation inappropriate: "Now, there can be no doubt," he says, "that the North British Company handed over the plaintiff as a passenger to be carried on by the North-Eastern Company to Newcastle. They had not running powers over the line, but they handed him over to the North-Eastern Company, under what are called traffic arrangements. When the plaintiff went to the

North British Company and took a ticket, under which he was to be carried from Angerton to Newcastle, he, in effect, agreed that the North British Company should secure that the North-Eastern Company should carry him on from Morpeth (to wit, Napanee) to Newcastle (to wit, Montreal); and when he engaged to travel at his own risk, he engaged with the North British Company that they should agree with the North-Eastern Company that he should be carried on to Newcastle exactly on the same terms as if the North British line extended to Newcastle. It is clear that this is the true construction of the ticket. 'In consideration of my being carried the whole way free of charge I agree that I shall be travelling the whole way at my own risk,' and it seems to me that the plaintiff did authorize the North British Company to contract for him with the North-Eastern Company, and what he authorized was that he should travel at his own risk."

Judgment.

OSLER,
J.A.

Then the learned Judge deals with the argument that "the company" is the term used throughout, and that this must be confined to the North British Company, thus limiting the risk to an accident on the line of that company. "I cannot think," he goes on, "that any such argument can be sustained from the terms used, which are on a general form applicable to all journeys. * * I think it must be taken that the plaintiff intended the terms on which he travelled to be communicated to the North-Eastern Company, and that he must be taken to have assented that the ticket should protect the North-Eastern Company just as much as the North British, and that the terms of this ticket extended to all risks connected with the journey which the plaintiff might meet with as a passenger."

In the case at bar stress was laid on the fact that the language of the ticket in the case cited was: "The holder * * exonerates 'the company' from all responsibility for injury to himself, however occasioned, on the journey for which it is issued or used." I cannot see that this is wider than the language of the condition in our case

Judgment.

OSLER,
J.A.

which declares that "the company" are not responsible to "any person or persons travelling upon any such free passes; the person using any such pass takes all risks of any kind, no matter how caused." In that case as in this the plaintiff knew that he was making one contract that he should travel all the way from the place of receipt to the place of delivery, though over two lines of railway, at his own risk. That was the journey indicated by the contract, and the decision cited, which seems to me, if I may say so, a most reasonable one, and which has never been overruled or dissented from, shews that the risk throughout the whole journey is assumed by the person who accepts the pass. I refer also to *Duff v. Great Northern R. W. Co.* (1878), 4 L. R. Ir. 178; *Johnson v. Great Southern and Western R. W. Co.* (1874), Ir. Rep. 9 C. L. 108; *McCawley v. Furness R. W. Co.* (1872), L. R. 8 Q. B. 57; *Gallin v. London and North-Western R. W. Co.* (1875), L. R. 10 Q. B. 212.

If I am right in holding that the pass is to be regarded as a free pass, then the decision in *Vogel v. Grand Trunk R. W. Co.* (1886), 11 S. C. R. 612, does not apply, because in that event the company could impose such conditions as they pleased, exempting them from liability for injuries caused by their negligence.

Nor does the case of *Woodruff v. Great Western R. W. Co.* (1859), 18 U. C. R. 420, apply, the point there decided being simply one of pleading, namely, whether the replication sufficiently averred that the plaintiff was not travelling upon the free pass and the conditions therein pleaded by the defendants, but upon a different contract, which was not subject to the conditions relied upon.

I think we should allow the appeal.

I do not think it necessary to say anything as to the condition endorsed upon the "special contract for the carriage of cattle." Neither of the parties referred to it, nor does anything appear to have turned upon it throughout the case. The shipping bill and receipt note were treated as containing the contract between the parties

upon the facts proved. I have dealt with the case upon the issues as tried and on the questions argued before us without special reference to the pleadings, which were not referred to by either party. It may be that in some respects they require amendment, and if either party thinks it prudent or necessary this may be done.

Judgment.

 OSLER,
J.A.

LISTER, J. A. :—

The main question to be determined in this appeal is, whether the contract entered into between the plaintiff and the Bay of Quinté Railway and Navigation Company for the transportation of a car load of cattle from Erinsville on the line of the above company to Montreal on the line of the Grand Trunk Railway Company and under which the plaintiff was on board of the defendants' train as the "man in charge" of the cattle enures to the benefit and protection of the defendants, so as to relieve them from liability in respect of the matters complained of.

It is conceded that at the time of the accident the plaintiff had been received and accepted by the defendants as a passenger and as such was travelling on the defendants' train.

Being a passenger, whether for hire or free, he became and was entitled to all the rights which that relation towards the defendants under the law gave him, that is to say, the defendants owed him a duty to so manage their trains that the plaintiff, a passenger thereon, should not, by their negligence, be injured, and unless the plaintiff, being a free passenger, had expressly contracted so that the defendants would be exempted from liability for injury resulting from their negligence they would be responsible.

That the injury complained of was occasioned by the negligence of the defendants' servants, who were in charge of the train which collided with the train in which the plaintiff was travelling, is also conceded.

It is therefore clear that, unless the contract between the plaintiff and the Bay of Quinté Company enures to the

Judgment.
LISTER,
J.A.

benefit and protection of the defendants, their position in relation to the plaintiff is that of a common carrier of passengers without a contract limiting their common law liability, and they would be responsible to the plaintiff in this action for the consequences of their negligence.

That it was competent for the plaintiff to agree with the Bay of Quinté Company to travel at his own risk of personal injury from whatever cause in consideration of being allowed to travel free is upon the authorities perfectly well settled: see *Hall v. North-Eastern R. W. Co.* (1875), L. R. 10 Q. B. 437; *Duff v. Great Northern R. W. Co.* (1878), 4 L. R. Ir. 178.

Dealing with the question as to whether the plaintiff was a free passenger or a passenger for hire, the learned trial Judge said: "But I do not think there is any evidence that he was being carried free. I should find, as a fact, that the consideration that he paid for the carriage of the cattle included his own carriage or the carriage of somebody in charge of the cattle."

With much respect I cannot think that such a finding is warranted by the facts proved, and is as it seems to me contrary to the express language of the contract, which provides for the payment of a fixed sum for the carriage of the cattle, and also provides that the plaintiff, in consideration of his thereby agreeing to assume certain risks, should under the words "pass man in charge" be allowed to travel free. By its terms he became entitled to "ride free" and by entering into it he declared that he was to ride free.

This point was considered in New York, in the case of *Bissell v. New York Central R. W. Co.* (1862), 25 N. Y. 442, and was concisely dealt with by Gould, J., who said: "Further, if he may make a contract by which he shall ride free, may he not, by contract, say that he is riding free, although he has paid for the transportation of his goods? How has the court any right to alter his contract and say that he is not riding free. * * When we once hold that assuming these risks is within his power as a matter of

contract, the court has no power to interfere with his contract on the score of quantum of consideration, or on any ground but illegality of consideration.”

Judgment.

LISTER,
J.A.

The plaintiff at the time of the accident was travelling under this contract and must in my opinion be regarded as a free passenger travelling under a contract which limited the liability of the carrier. It is quite true that the contract made it compulsory that a man should accompany the cattle to their destination. But it must be observed that it was optional with the man accompanying the cattle to accept a free pass by which he would agree to exempt the company from liability for personal injury caused by the negligence of the company, or purchase a ticket which would entitle him to all the rights of a passenger for hire. He elected to accept free transportation and the point is, do the terms of the contract extend to protect the defendants, as they would protect the Bay of Quinté Company had the accident happened on its line?

The case of *Hall v. North-Eastern R. W. Co.* (1875), L. R. 10 Q. B. 437, relied on by the defendants, was a case very like this in its facts. There the plaintiff was the “man in charge” of a shipment of sheep shipped from Angerton, a station on the line of the North British Railway Company, and carried to Newcastle, on the line of the North-Eastern Railway Company. The North British line extended to a place called Morpeth, and at that place the cattle truck and carriage in which the plaintiff was were attached to a train of the North-Eastern Railway Company to be sent on to its destination on the line of that company under what was assumed to be traffic arrangements between the North-Eastern Company and the North British Company.

After leaving Morpeth, the train in which the plaintiff travelled was run into by another train of the North-Eastern Company owing to the negligence of the servants in charge of the other train, and the plaintiff was injured.

The material parts of the ticket which was issued to the

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LISTER,
J.A.

plaintiff by the North British Company, and under which the sheep were sent, were as follows :

“ NORTH BRITISH RAILWAY COMPANY,
Live Stock Ticket.

78 sheep, from station Angerton to station
Newcastle, N.-E.

Terms of Special Contract.

If it is desired that any drover, or person accompanying live stock shall be allowed to travel in the same train as the live stock without paying a fare, he must travel at his own risk, and must either sign this in token that he agrees to travel at his own risk, or he must pay fare as a passenger.

I agree to travel at my own risk without paying any fare, and accept a free pass subject to the following conditions: This pass is issued free by the company, and subject to the following conditions on which it is accepted by the holder, viz.: That it is available only for the train by which the live stock is being conveyed, and if by a passenger train for third class only. That the holder is subject to the by-laws of the company, and he exonerates the company from all responsibility for injury or loss to himself howsoever occasioned on the journey for which it is issued or used.”

On the back of the ticket was: “Drover in charge of live stock are allowed to travel in the same train with the stock without paying fare, but solely at their own risk.”

The plaintiff did not sign the ticket and was not asked to do so, but he travelled on the same train with the sheep without having paid any fare.

It was contended for the plaintiff in that case, as in this, that he was lawfully on the defendants' railway, and that, the defendants having negligently driven another train against the train in which the plaintiff was riding and having injured him, they were liable.

It was further contended that the words “the company” in this ticket must be confined to the North British Com-

pany. It was held that the ticket under which the plaintiff travelled meant that he should be at his own risk during the whole of the journey ; and that it extended to protect the defendants just in the same way as it protected the North British Company from all liability for the consequences of any risk connected with the train or line of railway. Blackburn, J., at page 440, said : " By taking this ticket he made a contract for the whole journey with the North British Company ;" and, at p. 441, he further said : " Now, there can be no doubt that the North British Company handed over the plaintiff as a passenger to be carried on by the North-Eastern Company to Newcastle. They had not running powers over the line, but they handed him over to the North-Eastern Company under what are called traffic arrangements. When the plaintiff went to the North British Company and took a ticket, under which he was to be carried from Angerton to Newcastle, he, in effect, agreed that the North British Company should secure that the North-Eastern Company should carry him on from Morpeth to Newcastle ; and when he engaged to travel at his own risk, he engaged with the North British Company that they should agree with the North-Eastern Company that he should be carried on to Newcastle exactly on the same terms as if the North British line extended to Newcastle. * * I think it must be taken that the plaintiff intended * * the ticket should protect the North-Eastern Company just as much as the North British, and that the terms of this ticket extended to all risks connected with the journey which the plaintiff might meet with as a passenger."

Lush, J., in the same case, said : " The risk which the plaintiff encountered was a risk for the consequences of which the North British Company would have been liable as carriers of passengers, viz., the mismanagement of another train by their servants on their own line. Was there any difference that it occurred on the North-Eastern line ? I can see none. I do not think we are running counter to any case or principle of law. I think the plaintiff

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LISTER,
J.A.

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J.A.

was bound by the terms of the ticket just as much on the North-Eastern line as on the North British."

Manifestly the plaintiff in this case was received by the defendants as a passenger under the contract entered into by him with the Bay of Quinté Company in the same way as the plaintiff in the *Hall* case was received as a passenger by the North-Eastern Company under the ticket issued by the North British Company.

I am unable to discern any essential difference between the facts in the *Hall* case and the facts here.

The law as enunciated there must, as it seems to me, govern this case.

It follows that, in my opinion, this appeal ought to be allowed.

BURTON, C.J.O., MACLENNAN, and MOSS, JJ.A., concurred.

Appeal allowed.

R. S. C.

CASTON V. THE CITY OF TORONTO.

Assessment and Taxes—Failure to Distrain—Enforcing Payment in a Subsequent Year.

Where during all the time the roll is in the collector's hands there are goods and chattels available to answer the taxes but the collector fails to distrain, the amount due cannot be added to the taxes for a subsequent year and then levied by distress upon the goods of the tax debtor.

The provisions of section 135 of R. S. O. (1887) ch. 193, [R. S. O. ch. 224, sec. 147], requiring the collector to state the reason for his failure to collect taxes and to furnish a duplicate of his account to the clerk are imperative and if they are not observed the amount due cannot be added to the taxes for a subsequent year and then levied by distress upon the goods of the tax debtor.

Judgment of a Divisional Court, 30 O. R. 16, affirmed.

THIS was an appeal by the defendants from the judgment of a Divisional Court, reported 30 O. R. 16, and was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 15th of May, 1899. The facts are stated in the report below. Statement.

Fullerton, Q.C., and *W. C. Chisholm*, for the appellants.
Clute, Q.C., and *J. W. McCullough*, for the respondent.

June 29th, 1899. BURTON, C.J.O. :—

The facts are very fully set forth in the statement of the learned Chief Justice of the Queen's Bench Division who delivered the judgment of the Divisional Court, and the only question now remaining for decision is whether the city has shewn any justification for distraining on the plaintiff's goods and chattels in June, 1896, for taxes alleged to be due for the year 1891 on lot No. 65 Huntley street, when it is conceded that there were then and ever since have been on the said premises more than sufficient distrainable property to satisfy the said arrears if any were due.

It may be assumed in the present case that the collector duly made a demand for the taxes claimed, and was in a position to levy the same by distress.

Judgment.

BURTON,
C.J.O.

The collector's duties in such a case appear to be very clearly defined by the statute, and the only way in which he can discharge himself for the sums mentioned in the roll is by making oath before the treasurer that he has not been able upon diligent enquiry to discover sufficient goods or chattels belonging to or in the possession of the persons charged with or liable to pay such sums, or on the premises belonging to or in the possession of any occupant thereof, and making one of the following returns upon the roll itself: Either that the owner of the land is non-resident; or that there is not sufficient property to distrain; or that he is instructed by the council not to collect.

The collector—I am speaking now of the collector in 1891—made no such return upon his roll, but he returned to the treasurer an account of what was apparently due upon his roll without any explanation of its remaining unpaid, nor did he deliver a duplicate of such account to the clerk, who could not, therefore, furnish, as required by law, a notice to the parties interested in the payment of the taxes so in arrear.

I entirely agree with the learned Chief Justice that the requirements of this provision are imperative, and that any account delivered by the collector to the treasurer which does not conform to these requirements is ineffectual to sustain any further proceedings against the lands assessed, and I incline also to the view that they cannot be recovered as a debt under section 131 [55 Vict. ch. 48 (O.)] until every other remedy has been tried and failed, although that question is not before us, and it will be time enough to consider it when it arises.

It was obviously the intention of the Legislature that the taxes should be collected in a summary way by distress whilst the roll is in the collector's hands, and the provisions as to handing the account to the treasurer and the duplicate to the clerk were passed in the interest of the public, and to prevent the injustice of innocent occupants or purchasers of land being made liable for the taxes of

previous owners whose taxes might have been collected if the city's officials had properly discharged their duties, and ought to be rigidly adhered to.

Judgment.
BURTON,
C.J.O.

I think that the remedy in the present case must be sought against the collector or his sureties.

It would be a manifest injustice if future tenants or occupants should be under the necessity of defending themselves against demands for arrears of taxes which might have been enforced against the parties legally liable but for the gross negligence of the city or its officials.

It may be very true that where the party assessed continues to be owner of the land there would be no hardship in enforcing the lien as against him, but the Act is intended to apply to all cases, and then there would be no justice in enforcing it against the lands in the hands of subsequent purchasers.

But there is a further ground which, to my mind, is conclusive against the right of the city to justify this distress. The power of the clerk to enter taxes on the collector's roll for a year subsequent to that in which they were first imposed exists in one case only, and that is in case during the currency of the first collector's roll the property was unoccupied. In such cases if, in examining the assessment roll when returned by the assessor, under section 143, he finds that a lot embraced in the list last received by him from the treasurer pursuant to section 140 is entered upon the roll as then occupied, it becomes his duty forthwith to furnish to the treasurer the parcel of land which has thus become occupied, and the treasurer is then required to return to the clerk an account of the arrears in respect of such occupied lands, and it is then, and only in such a case, that he is empowered in making out the collector's roll for the year to add such arrears to those assessed against such occupied lands for the current year to be collected in the same manner as the other taxes on the roll.

As this land did not fall within the description, having been occupied during the year 1891, it is manifest that the

Judgment.
BURTON,
C.J.O. act of the clerk in placing it on the roll in 1895 was unauthorized and void and the distress illegal. I agree, therefore, with the Divisional Court and think that the appeal should be dismissed.

I think under the circumstances no case has been made out for increasing the damages.

OSLER, J. A. :—

I agree in the result, though not without some doubt. The effect of the judgment would seem to be (I express no final opinion on the point) that there are now no further remedies open to the defendants for the recovery of the arrears of taxes. That might be a strong reason for holding many of the requirements of section 135 [55 Vict. ch. 48 (O.)] not mandatory or imperative nor conditional to the right to take further proceedings by way of distress upon the goods of the debtor for the taxes, when they have been returned as in arrear in the list furnished by the treasurer to the clerk under section 140. Does the falsity of the oath taken by the collector under section 136, by which he obtains credit for the amount not realized by him on his roll, discharge the party assessed from further liability or so invalidate his return, whether he has or has not (as in this instance he has) omitted to make the entries on the roll, required by section 135, opposite the name of the party assessed, that no subsequent proceedings can be founded upon it?

The return was in fact made to the treasurer, and the taxes were in fact in arrear and unpaid, though payment had been demanded and the treasurer had furnished to the clerk, as required by section 140, the list of lands in respect of which taxes had been in arrear for three years. On this list the plaintiff's land appeared charged with the tax for 1891 which he had neglected to pay, and as the result of proceedings regularly taken under sections 141 and 143, the arrears for that year were added to the taxes for 1895 and placed on the collector's roll for that year. Then, as these arrears were to be collected in the same manner as

the other taxes for 1895, as provided by section 143 (3), and 123, 124, involving notice to the tax debtor and demand of payment, I feel a difficulty in satisfying myself why those provisions of section 135 should be held imperative or mandatory which directed the collector to furnish the clerk with the duplicate of his return to the treasurer of the taxes on the roll of 1891, and the clerk to mail notice to the persons, to wit, *inter alia* the plaintiff, appearing on that roll to be in arrear for that year.

Judgment.

OSLER,
J.A.

We are dealing, it must be remembered, not with proceedings which have resulted in a sale of the land, or which could do so except after fresh notice and a new default, nor with procedure for the imposition of the tax, but with proceedings for its collection by distress in default of payment after notice, and that from the tax debtor himself, who has sustained no injury by reason of the irregularities complained of.

How far a third party might be entitled to say that the defendants were estopped from asserting that the taxes remained unpaid after their officers had failed to collect them by distress when there were sufficient goods on the premises, it is not necessary to consider.

On the whole, while I do not dissent from the judgment of affirmance, I give my vote therefor with no little doubt and hesitation.

Moss, J.A. :—

The plaintiff's counsel renewed in this Court two contentions which had been unsuccessfully urged on his behalf in the Courts below: First, that it was proved that the plaintiff did pay the collector the taxes for the year 1891, on or about the 16th of January, 1892; and second (as an alternative), that there was no evidence of demand made upon the plaintiff by the collector appointed to collect the taxes for the year 1891 for the payment of such taxes, and that it ought to be inferred or found that no such demand was made.

Judgment,

Moss,
J.A.

But there is evidence quite sufficient to support the conclusions arrived at by the learned trial Judge, and these having been confirmed by the Divisional Court there is no ground for interfering with them.

The case remains to be dealt with upon the footing that, although duly demanded, the taxes for 1891, or the greater part of them, were not paid, and were in arrear in 1895-96.

The question then is as to the validity of the distress made in 1896 by the collector appointed to collect the taxes for 1895, for a sum which included the arrears of 1891.

In 1891-92, while the collector for 1891 had the roll in his hands, the land in question was occupied by the plaintiff, and there were on the premises goods and chattels liable to distress more than sufficient to satisfy the taxes due thereon.

The collector's duty was to proceed to collect the taxes mentioned in his collection roll, and for that purpose to take the steps which the Assessment Act directed him to take; and in this instance there seems to have been no reason why he should not have realized the taxes before returning his roll to the treasurer. The owner was not non-resident. There was sufficient property to distrain, and the collector was not instructed by the council not to collect.

He returned the roll to the treasurer without having collected the taxes, and he also delivered to the treasurer an account of all the taxes remaining due on the roll, including the taxes in question. But he shewed no reason why he did not or could not collect the same, neither did he furnish the clerk with a duplicate of the account; consequently no notice was mailed or sent to the plaintiff informing him that his land appeared to be in arrear for the year 1891.

It is argued for the defendants that the failure to send a duplicate account to the clerk, and to state in the account rendered to the treasurer the reasons why the collector could not collect the taxes, are not objections open to the

taxpayer to make; that the account is a matter between the collector and the municipality only, and the directions of the statute are not imperative.

But some at least of these directions are of importance to the taxpayer. They affect in material respects his position and rights, because they form the foundation for subsequent proceedings by which he or his property may be materially affected.

A comparatively long line of decisions has established that in case of a known owner or occupant there must not only be a demand made on him for payment of the taxes, but there must be an absence of goods on the land liable to be distrained before the land can be properly returned to the treasurer under provisions equivalent to sections 132-134 and 135 of the Assessment Act, 1892, and that unless these things can be properly shewn there can be no return to the treasurer upon which he can rightly base the list, which under section 140 it is his duty to prepare and furnish to the clerk, of all lands in the municipality in respect of which taxes have been in arrear for three years.

These are requisitions intended for the protection of the owner and taxpayer and to prevent a sacrifice of his property, and are to be followed if subsequent acts are to be valid.

Now, however much it may be considered that the statement of reasons why the collector could not collect and his making oath before the treasurer are matters merely between the collector and the municipality, it is not possible to say the same thing with regard to the direction as to furnishing the clerk of the municipality with a duplicate of the account.

That direction does especially affect the taxpayer and is for his protection, for upon receiving such account it is the duty of the clerk to mail a notice to each person appearing on the roll with respect to whose land any taxes appear to be in arrear. The Act says he shall do so.

The taxpayer is thus put upon his guard.

Where, as in this case, there is a complete failure to

Judgment.

Moss,
J.A.

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Moss,
J.A.

furnish the clerk with a duplicate, the taxpayers whose taxes appear to be in arrear are wholly deprived of the benefit of the notice which the statute says they are entitled to have mailed to them.

The advantages of the immediate sending of such a notice are apparent from what has taken place in this case.

There is a dispute between the plaintiff and the collector as to the fact of whether or not the taxes were paid while the roll was in the collector's hands. There is a conflict of testimony and of recollection after the lapse of between five and six years. If the clerk had received the account and sent the notice in 1892, as the statute provides, the plaintiff's attention would have been at once directed to the statement that the collector claimed that the taxes were in arrear and the matter might then have been adjusted without much difficulty.

The importance to the taxpayer of a proper compliance with this direction of the statute, coupled with the imperative language, seems to me good ground for holding that it was intended to be and is imperative, and that when there has been a failure to observe it, the collection of the taxes affected by such failure is not, under the statute, capable of being placed back in the hands of a collector for any subsequent year, but such taxes must remain to be collected by the treasurer by such other means, if any, as the statute leaves open to him.

The case is not one for increasing the award of damages and I would therefore affirm the judgment of the Divisional Court.

MACLENNAN, and LISTER, JJ.A., concurred.

Appeal dismissed.

R. S. C.

TYTLER V. CANADIAN PACIFIC RAILWAY COMPANY.

Action—Jurisdiction—Canadian Pacific Railway Company—Negligence in Another Province—Service of Writ.

In an action brought here against the Canadian Pacific Railway Company by the personal representative, appointed in this Province, of a person killed in British Columbia through the negligence there of servants of the company the writ may be served on the defendants in this Province in accordance with the provisions of Consolidated Rules 159 and 160.

Judgment of MEREDITH, J., 29 O. R. 654, affirmed.

THIS was an appeal by the defendants from the judgment of MEREDITH, J., reported 29 O. R. 654, and was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 27th of March, 1899. The question involved was whether the personal representative, appointed in Ontario, of a person killed in British Columbia owing to the defendants' negligence, could sue the defendants in Ontario. The facts are stated at length in the report below. Statement.

Robinson, Q. C., Aylesworth, Q. C., and Angus MacMurchy, for the appellants.

John Tytler, for the respondent.

June 29th, 1899. BURTON, C. J. O.:—

The question raised in this case is whether for a cause of action arising in the Province of British Columbia, service of process can be effected upon the defendants under the Consolidated Rule 160, or whether the plaintiff is confined to the mode of service prescribed under the company's charter, 44 Vict. ch. 1 (D.), sec. 9 of the schedule of which provides that the chief place of business shall be at the city of Montreal, and that the company shall appoint and fix by by-law at least one place in each province or territory through which the railway shall pass where service of process may be made upon the company in

Judgment.
BURTON,
C.J.O.

respect of any cause of action arising within such province or territory, and that in default of their appointing and fixing a place, such process may be validly served upon the company at any of the stations of the railway in any such province or territory.

It will be noticed that the service in the mode prescribed applies only to cases in which the cause of action arises within the particular province, and it is contended that this being a railway with which the Dominion Parliament has alone power to deal the mode thus prescribed must be followed, and that, as the cause of action did not arise within the Province of Ontario, the service is invalid, and the defendants have appeared under protest and have raised this point as a question of law to be disposed of in the first instance. It came up therefore in that way before Mr. Justice Meredith, who decided in favour of the plaintiff and this appeal is against that decision.

The action, if against an individual, being transitory could no doubt have been brought against him either in the province in which the tort occurred or wherever he could be found and served.

Much stress was laid upon the fact that the Act incorporating the company was an Act of the Dominion, which had exclusive jurisdiction over the railway, and therefore that the railway could not be interfered with by provincial legislation or rules framed by the Courts under the authority of the Legislature, but there is very little in that contention, because whilst the British North America Act gave Parliament control over the railway *quâ* railway, it did not declare that the railway should cease to be part of the province in which it was situated, or that it should be exempted from liabilities, such as for instance direct taxation upon those portions of it which were within the province for the purpose of a revenue for provincial purposes, or many other matters within the competence of provincial legislation.

There is nothing in the Dominion charter taking away or professing to change the law in reference to bringing

a transitory action in any province in which the company is domiciled or resident, and it may be questioned whether Parliament would have had any jurisdiction so to enact.

Judgment.
BURTON,
C.J.O.

The effect of the 9th section and of the action taken by the company upon it is to make the company a resident in each province in which the line of their railway runs, and where they have station masters, and brings them expressly within Rule 160. I entertain no doubt, therefore, that the judgment below is right and should be affirmed.

To those who urged so strongly that the Legislature had no authority to interfere, I would refer to a recent and very far reaching judgment of the Judicial Committee of the Privy Council in *Canadian Pacific R. W. Co. v. Parish of Notre Dame de Bonsecours*, [1899] A. C. 367, (1899), 80 L. T. N. S. 434.

OSLER, J. A. :—

This is an action for a tort committed in a foreign country, to wit, the Province of British Columbia, foreign in the sense that the Courts of this Province have no jurisdiction there, and it is not maintainable in our Courts unless there is authority to serve process upon the defendants within the province, since the Rules do not admit of the service being made upon them as foreigners or British subjects (if a corporation can be so spoken of) out of the jurisdiction, the tort sued for not having been committed within the province. The status of the plaintiff to maintain an action for the particular tort sued for, either in British Columbia, or, apart from the question of the right to serve process upon the defendants, in this Province, is not before us and we pronounce no opinion thereon. If a cause of action under the facts alleged arose, as we must for the purpose of the appeal assume that it did, in British Columbia, then, if the plaintiff could effect a valid service upon the defendants here, it is clear that for this cause of action so arising in a foreign country an action would lie in our Courts at the suit of

Judgment.

OSLER,
J.A.

any one in whom is vested the right to bring it, as it would have lain therefor had it arisen within their jurisdiction: *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; Dicey on the Conflict of Laws (1896), pp. 32, 33, 234; *Machado v. Fontes*, [1897] 2 Q. B. 231.

The argument for the defendants seems mainly to rest upon the 9th clause of the schedule of the contract referred to in their Special Act, 44 Vict. ch. 1 (D.), which provides that the chief place of business of the company shall be at Montreal but that they may by by-law appoint other places within the Dominion at which the business of the company may be transacted and at which directors and shareholders may meet, and that they shall appoint and fix by by-law at least one place in each province or territory through which the railway shall pass where service of process may be made upon the company in respect of any cause of action arising within such province or territory, and that if any cause of action shall arise against the company within any province or territory service of such process issued out of any court therein may be validly made upon the company at the place within such province or territory so appointed, but if the company fail to appoint etc., any such process may be validly served upon the company at any of the stations of the railway within such province or territory.

It is contended, if I rightly appreciate the argument, that by this legislation, as it may properly be called, Parliament meant to declare that service should only be made in the prescribed manner, the necessary inference being that any action against the company must be brought only in the courts of the province within which the cause of action arose.

While, however, it could not be successfully contended by the company that service of process might not be validly effected in the prescribed manner in all cases to which the section or clause referred to applies, I think it would be going a long way to hold that Parliament intended thereby to alter, even if the subject lay within

their jurisdiction, the general law of the land in this respect, and to prohibit a plaintiff from bringing an action in our Courts against these defendants, where, under similar circumstances, he could have brought it against any one else for a cause of action arising out of the jurisdiction.

Judgment.

OSLER,
J.A.

The sufficient answer to the defendants' contention on this point seems to be that the case is not within the Act. We are, therefore, not called upon to express any opinion as to whether the legislation referred to is *ultra vires*. The case of *McArthur v. Northern and Pacific Junction R. W. Co.* (1890), 17 A. R. 86, was referred to, and it was attempted to compare the provision there in question, viz., the six months' limitation clause, with the provision in question here as to service of a writ. I will not again go over the grounds on which I thought the former might well be regarded as within the power of Parliament dealing generally with the incorporation of a railway. I will only add that the recent decision of the Privy Council in *Canadian Pacific R. W. Co. v. Parish of Notre Dame de Bonsecours*, [1899] A. C. 367, (1899), 80 L. T. N. S. 434, having regard to the subject of the action, affords no support to the view that the limitation clause is *ultra vires* Parliament.

Is there then any provision in our practice for effecting a valid service of process on the defendants, whose head office and principal place of business is not within this Province?

The question comes before us in an unusual manner. It is generally raised, so far as I am aware, on a motion to set aside the attempted service. Here it has been raised upon the pleadings, the defendants besides pleading generally to the merits alleging further and as "a matter of law and in view of the provisions of the statute incorporating them that the plaintiff's cause of action having arisen wholly in another province, the service of the writ of summons made upon them was not properly made, and that this Court has no jurisdiction over them, and no jurisdiction to entertain the action."

Judgment.

OSLER,
J.A.

How the service was in fact made we do not know. The case was set down (presumably under Rule 373 or perhaps under Rule 259), for judgment upon the point of law raised in the statement of defence. There is an affidavit of the plaintiff, sworn after the case was set down, which seems to have been made for the purpose of some other proceeding in the case in which it is stated on the plaintiff's information and belief, that the defendants' head office is in Montreal, and that in the Province of Ontario they have a general superintendent and other officers looking after and managing the affairs of the company in Ontario, where they transact the general business of the company done in Ontario, and whose office is at the city of Toronto, where the affairs of the Ontario division are transacted and controlled. I do not see that this affidavit affords much assistance.

We know that the defendants' head office is in Montreal; we know that their line traverses the Dominion from one end to the other; and we know that they have numerous stations on their line where it passes through our own Province, at each of which some of their business is done.

The case then clearly comes within Consolidated Rules 159, 160. The former would be sufficient for the purpose of holding that there is a means provided whereby service could be effected here upon the defendants as a foreign corporation if they could be shewn to be doing business within Ontario, and therefore that the action would lie, but the latter simplifies the plaintiff's course in the case of a railway company and other companies, by defining the officer upon whom service may be made, which shall be effectual service upon the company.

No distinction is made in the latter rule between companies whose head office or chief place of business is outside the Province, but who carry on business within the Province and are for that reason to be treated as resident here, and those which are solely provincial corporations, nor, in either rule, between causes of action which arise within another jurisdiction, but which may be the

subject of an action here, and those which arise within the jurisdiction. Upon the construction of the former rule the cases of *Newby v. Von Oppen and Colts Patent Firearms Co.* (1872), L. R. 7 Q. B. 293; *Palmer v. Gould's Manufacturing Co.* (1884), W. N. 63; *Haggin v. Comptoir D'Escompte de Paris* (1889), 23 Q. B. D. 519; and *La Bourgogne*, [1899] P. 1; which has been recently affirmed in the House of Lords, are authorities in favour of the plaintiff. Indeed it was hardly contended that they did not govern this case if the argument upon the defendants' Act was unsuccessful. There being no statute whereby, in a case like the present, service may be made in any other manner, Rule 161 does not apply, and service may, therefore, be effectually made under Rules 159 and 160, so that the defence fails and the appeal must be dismissed.

Judgment.

OSLER,
J.A.

MACLENNAN, MOSS, and LISTER, JJ.A., concurred.

*Appeal dismissed.**

R. S. C.

* See *Murphy v. Phoenix Bridge Co.* (1899), 18. P. R. 406.

IN RE TOWNSHIP OF ROCHESTER AND TOWNSHIP OF MERSEA.

Drainage—Branch Drains—Separate Assessment—Admendment of Engineer's Report.

Where it is essential for the purpose of draining an area, a drainage work may include such branch drains as may be necessary, and the main drain and branches may be repaired and enlarged in case of necessity under one joint scheme and joint assessment, a separate scheme and separate assessment for the main drain and for each branch not being necessary.

Under sub-sec. 3 of sec. 89 of the Municipal Drainage Act, R. S. O. ch. 226, the Drainage Referee has jurisdiction, with the consent of the engineer and upon evidence given, to amend the engineer's report by charging against the municipalities for "injuring liability" assessments erroneously charged against them by the engineer for "outlet liability."

Judgment of the Drainage Referee reversed.

Statement.

THIS was an appeal by the township of Rochester from the judgment of the Drainage Referee, and was argued before BURTON, C. J. O., MACLENNAN, MOSS, and LISTER, JJ. A., on the 22nd, 25th, and 26th of May, 1899.

Matthew Wilson, Q.C., and J. G. Kerr, for the appellants.
A. H. Clarke, and M. K. Cowan, for the respondents.

September 12th, 1899. The judgment of the Court, in which the facts are stated, was delivered by

LISTER, J. A. :—

This is an appeal by the municipal corporation of the township of Rochester against the decision or judgment of the Drainage Referee setting aside the report and assessment of its engineer in respect of the proposed work of cleaning out and enlarging that portion of the Ruscom river drain and its east branch, the Silver creek drain, within its limits.

On the 9th of April, 1898, Rochester provisionally passed a by-law to provide for enlarging and otherwise improving that portion of the Ruscom river drain and its eastern branch, the Silver creek drain, within its own

limits, and it was therein recited "that complaint had been made that the Ruscom river drain and its branch, the Silver creek drain, were insufficient in capacity and totally inadequate to properly retain and carry off the water which was brought into them, and that the council had procured a surveyor to examine the same and report on the condition thereof, and to prepare plans, specifications and estimates of the drainage works, and an assessment to be made of the lands and roads to be benefited by such drainage works, and of all other lands and roads liable for contribution thereto, stating as nearly as he could the proportion of benefit, outlet liability, and injuring liability, which in his opinion would be derived or incurred in consequence of such drainage works by every road and lot or portion of lot, and that copies of such report, plans and specifications, estimates and assessments, had been served upon the head of the respective municipalities of Tilbury North, Tilbury West, Mersea, Gosfield North, and Gosfield South, as required by sec. 61 of the Drainage Act, 1894."

Judgment.

 LISTER,
J.A.

And it then enacted that the report, etc., should be adopted and that the drainage work as therein indicated and set forth should be made and constructed in accordance therewith.

That portion of the report relating to the cost of the proposed work and the distribution of such cost on the several municipalities liable to contribute thereto is as follows:—

"My estimate of the cost of the whole of the above works, as per plan and specifications is the sum of \$30,080 as set forth in the detailed estimates hereto annexed. To this amount I have added ten per cent. for incidental expenses making a total estimate of \$33,088.

Of this amount I have assessed the township of Rochester with the sum of \$10,204.02 on lands, the sum of \$941.50 on roads, and the sum of \$1,641.22 for bridges, thus making the total assessment of Rochester \$12,786.74 as set forth in the schedule of assessment hereto annexed.

Judgment.

LISTER,
J.A.

I have assessed the township of Tilbury North with the sum of \$399.80 on lands, and the sum of \$81 on roads, thus making the total assessment of Tilbury North \$480.80 as set forth in the schedule of assessment hereto annexed.

I have assessed the township of Tilbury West with the sum of \$2,552.55 on lands, and the sum of \$387 on roads, thus making the total assessment of Tilbury West \$2,939.55 as set forth in the schedule of the assessment hereto annexed.

I have assessed the township of Mersea with the sum of \$7,388.91 on lands, and the sum of \$463.50 on roads, thus making the total assessment of Mersea \$7,852.41 as set forth in the schedule of assessment hereto annexed.

I have assessed the township of Gosfield North with the sum of \$7,868 on lands, and the sum of \$572 on roads, thus making the total assessment of Gosfield North \$8,440 as set forth in the schedule of assessment hereto annexed.

I have assessed the township of Gosfield South with the sum of \$538.50 on lands, and the sum of \$30 on roads, thus making the total assessment of Gosfield South \$568.50 as set forth in the schedule of assessment hereto annexed."

Accompanying the report were the schedules shewing the lands and roads assessed for the several municipalities for the expense of the proposed work and which were headed as follows:—

Con.	Lot or part of lot	Area Acres	Owner's Name	Value of Benefit	Value of Out- let Lia- bility	Total Value of im- prove- ment.
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All the lands and roads assessed in the upper townships (being all the townships assessed except Rochester) were assessed under the column headed "outlet liability."

The townships of Mersea, Gosfield North and Gosfield South, appealed to the Referee against the report, plans, specifications, etc., on the following grounds:—

1. "The scheme of the proposed drainage works should

be abandoned because of the great disproportion between the cost of the work, namely, \$33,088, and the benefit to be derived by lands and roads from the said work.

Judgment.

LISTER,
J.A.

2. That no sufficient petition was presented to the municipal council of the corporation of the township of Rochester asking for the said work, which is in reality an original construction, the old drain which it pretends to improve being so much smaller that the present scheme is practically new work.

3. That the lands and roads assessed for the proposed work are situate miles distant from the proposed work, and have without such work ample drainage and ample outlet for all waters falling upon and draining over such lands and roads, and the proposed work will not afford any improved outlet for the said lands and roads, and their assessment under the head of outlet liability is illegal and unwarranted.

4. That the River Ruscom is a natural watercourse with well defined banks extending both into the township of Gosfield North in its main branch, and into the township of Mersea on the Silver creek branch, and all the water which is conducted into the said natural watercourse in the said upper townships naturally tends thereto, and the said lands and roads have a legal right to use such natural watercourse without being assessed in respect of any work for its improvement in the township of Rochester.

5. That the necessary steps provided by the Municipal Drainage Act, such as calling a meeting of ratepayers to consider the report of the engineer, the passing of a provisional by-law and other formalities have not been complied with.

6. That the lands proposed to be assessed for the said drainage works are not sufficiently described in the schedule of assessments to enable or justify a tax being levied and enforced against such imperfectly described lands.

7. That the engineer's assessment is erroneous in includ-

Judgment.

LISTER,
J.A.

ing the sum of \$1,000 to pay all unavoidable damages to owners of lands, there being no contemplated damage to any particular lots shewn to warrant the estimate for such damage, and the said estimates are also erroneous in adding, first, ten per cent. to said \$1,000 for damages, and afterwards ten per cent. to the total cost of the work, including such damages and percentage.

8. That the assessment against the lands and roads in the appealing townships is unjust and excessive.

9. And generally upon such further and other grounds as upon hearing the evidence will appear from the testimony of witnesses, and from the proceedings had and taken in reference to the proposed work."

The townships of Tilbury North and West did not appeal.

The Referee held and determined that the assessment was void and set aside the report and assessment in so far as the same affected the appealing townships.

The drains were constructed in the year 1883 by the corporation of the county of Essex under the authority of a by-law passed in pursuance of sec. 598 of the Consolidated Municipal Act, 1883, as a single scheme with a single assessment.

They were designed to relieve the lands of Rochester from water brought down by Mersea and Gosfield, and were respectively constructed in the course of what was locally known as the Ruscom river and Silver creek.

Silver creek drain was constructed as a branch of the Ruscom river drain.

The Ruscom river within Rochester, to a point north of the railway, appears to have been a large running swale.

Silver creek was also a running swale joining the Ruscom river, at a point south of the railway.

After the construction of these drains by the county the upper townships constructed new, and enlarged and extended old, drains which had the effect of conducting water from the upper townships into the Ruscom river

and Silver creek drains in greatly increased volume, and which the last named drains were insufficient to carry off, with the result that they overflowed and flooded and damaged the lands of Rochester. The proposed work was intended to relieve Rochester from not only its own water, but from the water so brought down by the other townships by so improving the drains as to make them sufficient to carry off such waters.

Judgment.

 LISTER,
J.A.

The learned Referee bases his judgment upon two grounds (1) that the assessment of the engineer was erroneous in this, that the lands in the respondent townships ought to have been assessed for injuring liability and not for outlet, and (2) that the drainage system divides into two main branches, each having a separate drainage area, and that the appropriate drainage area should be assessed for the cost of its branch, instead of assessing the whole cost upon both areas as if they constituted but one area. And he determined that the assessment was therefore invalid and he also determined that the statute does not confer upon him power or jurisdiction to correct or amend the report so as to change the assessment from outlet to injuring liability.

I agree that the lands of the respondent townships ought to have been assessed for injuring and not outlet liability. There was evidence tending to shew that whether assessed in one way or the other the quantum of assessment on the various parcels of land would have been the same.

The first question for consideration is, does the statute confer on the referee jurisdiction to correct and amend the report in respect of the errors above mentioned?

Sub-section 3 of section 89 of "The Municipal Drainage Act," R. S. O. ch. 226, provides that "The Referee shall have power, * * with the engineer's consent and upon evidence given, to amend the report in such manner as may be deemed just, and upon such terms as may be deemed proper for the protection of all parties interested, and, if necessary by reason of such amendments, to change

Judgment.
LISTER,
J.A.

the gross amount of any assessment made against any municipality, but in no case shall he assume the duties conferred by this Act upon the Court of Revision or a County Judge."

The language of this section is, as it appears to me, sufficiently comprehensive to confer on the Referee, with the consent of the engineer and upon evidence given, jurisdiction to correct and amend the report (of which the assessment schedule is a part) in respect of an error or defect such as he found to exist here.

If the limited construction placed on the words of this sub-section by the Referee were to prevail the object of the Act would be defeated; a single parcel of land assessed under what the Referee might determine to be the wrong heading would render the whole assessment nugatory. Such could not have been the intention of the Legislature, and is not in my judgment the true interpretation of the section.

In considering the second ground, it must be borne in mind that the purpose contemplated by the county in constructing the drains was the drainage of an area; the relieving of lands in Rochester from water, a portion of which was caused to flow from the upper townships into Rochester to the injury of its lands, and that in the opinion of the engineer, and agreed to by the council, it was essential in order to effect this purpose, that, not only the main or Ruscom river drain should be constructed, but that the eastern branch or Silver creek drain should also be constructed, and that both were in fact constructed under one by-law as a single scheme or undertaking with a single assessment upon the lands liable to contribute to the expense thereof.

There can be no doubt that a drainage work may include such branch drains as may be necessary to render the drainage of the area effective, and that the main and branch drains may be regarded as a single scheme or undertaking, for the expense of which the lands in any way liable to contribute may be assessed as for a single scheme. There

is no provision of the statute which suggests, in such a scheme, the necessity of a separate assessment. It may be, that an assessment for the cost of a work, such as the drainage work in question, is unequal and unjust; lands may have been assessed too high while other lands have been assessed too low; lands may have been assessed which ought not to have been assessed, and other lands which ought to have been assessed, may have been omitted, but these are all matters proper to be adjusted and determined by the Court of Revision of each municipality, and not by the Referee, who under the Act is authorized to deal only with the gross amount of the assessment against each municipality assessed.

Judgment.

 LISTER,
 J.A.

The contention on the part of the respondents that the proposed work is practically a new work and cannot be undertaken by the appellants without the petition of the ratepayers required by section 3 of the Act cannot be sustained.

The proposed work is one, which in my opinion may be undertaken under section 75, but whether it is regarded as a new work or the improvement of an old drain is immaterial; in either view, in the circumstances of this case, it may be initiated and proceeded with, without petition; if a new work under sub-sec. 3 of sec. 3 of the Act, and if it is the improvement of an old drain, under section 75.

The evidence establishing that by means of drains constructed by the respondent townships water has been caused to flow from the lands and roads of their townships upon and to injure the lands and roads of the appellant township, the lands and roads of the respondent townships are under sub-sec. 3 of sec. 3 liable, subject to the formalities and powers therein contained, except the petition, to be assessed and charged as for "injuring liability" for the construction and maintenance of drainage works required for relieving the injured lands or roads from the water so caused to flow, and if the work is the improvement of an old drain it falls within section 75 of

Judgment. the Act, which provides that "Whenever, for the better
LISTER, maintenance of any drainage work constructed under the
J.A. provisions of this Act or any Act respecting drainage by
local assessment, or to prevent damage to any lands or
roads, it is deemed expedient to change the course of such
drainage work, or make a new outlet for the whole or any
part of the work, or otherwise improve, extend, or alter the
work, * * the council of the municipality or of any of the
municipalities whose duty it is to maintain the said drain-
age work, may, without the petition required by section 3
of this Act, but on the report of an engineer or surveyor
appointed by them to examine and report on the same,
undertake and complete the change of course, new out-
let, improvement, extension, alteration, * * specified
in the report, and the engineer or surveyor shall for such
change of course, new outlet, improvement, extension,
alteration, * * have all the powers to assess and charge
lands and roads in any way liable to assessment under
this Act for the expense thereof in the same manner, and
to the same extent, by the same proceedings and subject to
the same rights of appeal as are provided with regard to
any drainage work constructed under the provisions of
this Act."

What I have said as to the amendment of the report in
respect to lands assessed under the wrong head applies to
lands assessed but improperly or insufficiently described.

The Referee has made no finding as to whether the
proposed scheme ought to be abandoned or modified.

Other objections to the scheme made by the respondents
are not, as it appears to me, fatal to this appeal and there-
fore I do not think it necessary now to discuss them.

The appeal must be allowed with costs, and the case
must go back to the Referee for further consideration;
the costs below and subsequent costs to be in his discretion.

Appeal allowed.

R. S. C.

IN RE POWERS AND TOWNSHIP OF CHATHAM.

Public Schools—R. S. O. ch. 292, secs. 38, 39—Alteration of School Sections.

AN appeal by the township of Chatham from the judgment of MEREDITH, J., reported 29 O. R. 571, was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 19th and 20th of September, 1899, and on the conclusion of the argument was dismissed with costs, the Court agreeing with the judgment in the Court below.

J. S. Fraser, for the appellants.

Aylesworth, Q.C., and *A. B. Carscallen*, for the respondent.

CRAWFORD V. TOWNSHIP OF ELLICE.

Drainage—Mandamus—Notice—Damages—Drain Insufficient to Carry Off Water.

To entitle a person who or whose property is injuriously affected by the condition of a drain to a mandamus for the performance of such work as may be necessary to put the drain in proper condition the notice required by sec. 73 of the Drainage Act, R. S. O. ch. 226, while not necessarily in technical form, must be so clear and precise that the municipality can decide whether the complaint is well founded or frivolous, and must be one which the municipality would be justified in acting upon under sub-section (a) of that section.

A letter referring to defects in the drain, and suggesting steps to be taken, but not calling upon the municipality to do specific work, is not sufficient.

The notice by which proceedings are initiated in Court cannot be regarded as a notice under section 73.

Judgment of the Drainage Referee affirmed.

A person who or whose property is injuriously affected by the condition of a drain is entitled to recover from the municipality charged with the duty of maintaining it such damages as he sustains by reason of its non-repair, whether caused by the flooding of his land by the waters of the drain, or by its failure to carry off the water which came upon the land in the course of nature.

Judgment of the Drainage Referee reversed.

Statement. THIS was an appeal by the plaintiff from the judgment of the Drainage Referee, and was argued before BURTON, C. J. O., MACLENNAN, MOSS, and LISTER, JJ. A., on the 5th and 6th of October, 1899.

J. P. Mabee, for the appellant.

Matthew Wilson, Q. C., for the respondents.

November 14th, 1899. The judgment of the Court, in which the facts are stated, was delivered by

LISTER, J. A. :—

This action, and two others by John E. Kerr, and Colin Kerr, were begun by writs issued on the 24th of September, 1898, and were brought to recover damages due to the failure and neglect of the defendants to maintain and keep in repair a drain known as the "Maitland Drain."

The injury complained of was occasioned not by the waters of the drain overflowing and flooding the plaintiff's lands, but from waters which came upon the plaintiff's lands from rain, snow, and hail, which were not drained off and carried away as they would have been if the drain had been kept in repair.

After statements of claim and defence had been delivered, the actions were, under the provisions of the Drainage Trials Act, referred to the Drainage Referee.

The action of the plaintiff Crawford was brought not only for damages, but for a mandamus.

The drain was constructed by the defendants under a by-law passed on the 18th of May, 1885, under the drainage provisions of the Municipal Act then in force, and the expense of construction was imposed upon the lands to be benefited by the work, and they were under the by-law assessed therefor.

The plaintiff's lands were included in such assessment, and were subsequently assessed for part of the expense of repairs done to the drain.

The drain was out of repair in the year 1894, and it continued in that condition up to the time of the trial.

On the 26th of November, 1894, the plaintiff wrote to the clerk of the defendant municipality as follows:—

“Dear Sir,

Herewith I beg to call the attention of your council to the insufficiency of the Maitland drain—south branch—owing to cattle on unoccupied lots going to the drain for drink, and to the further fact that there is little if any fall in this part of the drain; the ditch is badly filled in from Harloff's hill to the eastern end of the drain. There are also other lands not included in the original by-law that now drain into the Maitland, and in any scheme of just taxation should now be assessed.

I am also requested by Jacob Stackley, owner of lot 19, concession 16, to ask for the improvement of the main drain from the point where the last improvement left off to the eastern end of said drain.

Judgment.

LISTER,
J.A.

Judgment.

LISTER,
J.A.

I also beg to point out to your council that a number of lots in Mornington have recently been connected with the Maitland drainage system and that they should not have the benefit of this outlet for their lands without paying for it. When an improvement is made it should belong to those who pay for it. I therefore respectfully request your council to send on a competent engineer to assess those lands for benefit that the Maitland drain people have already paid for, and to do in time to have said lands contribute to the costs of the late litigation, and furthermore, if your council have not the power herein asked for, that the aid of the Legislature be invoked."

The plaintiff Crawford, on the 20th of November, 1897, and the other plaintiffs on the 23rd of January, 1898, began proceedings by notice under section 93 of the Municipal Drainage Act for the recovery of damages and for a mandamus in respect of the drain, which they discontinued before the present actions were commenced.

The Referee appointed the 16th of December, 1898, for the trial of these actions. The plaintiff Crawford's case was first taken up. It was arranged that the evidence taken in his case should be applicable to the other two cases. He was called and examined as a witness on his own behalf, and was the only witness examined. At the close of his evidence it was agreed that the cases should not then be proceeded with, but that the Referee should determine whether on the facts proved the defendants incurred any liability in respect of the injuries complained of and that if his decision should be adverse to the plaintiffs, and should on appeal be reversed by this Court, or if it should be in favour of the plaintiffs, the trials should be proceeded with on a subsequent day then fixed.

The Referee found as follows: "The plaintiff's evidence shews that when the drainage work was repaired in 1891, it afforded him sufficient drainage, but owing to various causes it has since then got into disrepair and does not now carry the water off his lands, whereby his crops have been flooded and injured and he has been unable to culti-

vate his farm as expected." But he held that the defendants incurred no liability for damages resulting from water, which came upon the plaintiff's lands from rain, snow, and hail, in the usual course of nature, not being drained off and carried away by reason of the non-repair of the drain.

For the purposes of this appeal the actions were by an order of the Referee, made on the 1st of February, 1899, consolidated.

In my opinion the appeal in so far as it relates to the liability of the defendants for damages occasioned by their neglect to keep the drain in repair ought to be allowed.

The drain is one which the statute requires the defendants to maintain or keep in repair, and for neglect or refusal to fulfil this duty they are, by section 73 of the Municipal Drainage Act, made liable in damages to any person interested, who or whose property is injuriously affected by such neglect or refusal.

The learned Referee has found that the defendants failed to perform their statutory duty to keep this drain in repair, and further, that such failure resulted in injury to the plaintiffs. Upon these findings the plaintiffs, who are persons interested in the drain and injuriously affected by its condition, are entitled to recover from the defendants such damages as they may be able to prove they have sustained in consequence of such neglect on the part of the defendants, and it appears to me to be quite immaterial whether the injury complained of was caused by the overflowing and flooding of the lands by the waters of the drain, or by its failure to carry off the water which came upon the lands by rain, snow, and hail, if the damage in either case was due to its non-repair.

Adopting the language of my brother Osler in *Stephens v. Moore* (1898), 25 A. R. 42, at p. 43, the plaintiffs are entitled to have the drain they have paid for kept in a reasonable state of repair. It was made for the purpose of draining their property and that of others interested in it, and if

Judgment.

LISTER,
J.A.

Judgment.
LISTER,
J.A.

the defendants refuse or neglect to repair it I do not think they can escape from their obligation, or be excused, short of proof that even if it were repaired it would from changes in the surrounding conditions be entirely useless to the plaintiff's property. And my brother Maclellan in the same case, at p. 45, said: "If for want of such repair water stands upon his land or any part of it, either in greater quantity or for a longer time than it otherwise would, that is something he is not obliged to submit to, even although it has done him no actual pecuniary damage. It is an injury to a right, for his right is to have it otherwise." See also *White v. Gosfield* (1883), 2 O. R. 287, affirmed (1884), 10 A. R. 555; *Raleigh v. Williams*, [1893] A. C. 540.

Then with respect to the right of the plaintiff Crawford to a mandamus. It is finally settled that the giving of the notice to repair, prescribed by section 73 of the Act, is a condition precedent to the right to maintain an action against a municipality for mandamus to compel it to repair a drain which it is under statutory obligation to maintain: *Raleigh v. Williams*, [1893] A. C. 540.

The defendants say that the plaintiff is not entitled to maintain his action for mandamus, because he did not before action give to them the notice to repair required by section 73. The plaintiff, on the other hand, contends that either his letter of the 26th of November, 1894, or the notice of the 20th of November, 1897, was a sufficient notice to repair within the meaning of section 73.

This section, in so far as it relates to a mandamus, enacts, that "any municipality neglecting or refusing to maintain any drainage work as aforesaid, upon reasonable notice in writing from any person or municipality interested therein who or whose property is injuriously affected by the condition of the drainage work, shall be compellable by mandamus issued by the referee or other court of competent jurisdiction to maintain the work, unless the notice shall be set aside or the work required thereby varied as hereinafter provided."

Then sub-section (a) authorizes an application to the referee by the municipality receiving the notice to set the same aside, and declares that the referee shall after hearing the parties and witnesses adjudicate upon the questions in issue, and confirm or set aside the notice, as to him may seem proper, or order that the work of maintenance shall be done wholly or in part.

The question is whether the plaintiff before action gave to the defendants such a notice to repair as will satisfy the statute.

I am of opinion that there was no sufficient notice to repair given to the defendants, and, therefore, the plaintiff as to this branch of his case fails.

It seems to me that what the statute requires is an unconditional notice or demand to repair under its provisions, given or made by a person interested in the drain, and who or whose property is injuriously affected by its condition.

The notice or demand ought to be for the performance of that which the plaintiff afterwards seeks to compel by mandamus; in short, it ought to be so clear and precise in its terms that the municipality might be able to ascertain whether the complaint was well founded or frivolous, and it ought to be a notice which the municipality would be justified in treating as a notice under section 73 for the purpose of an application to the referee under sub-sec. (a).

It is to be observed that the plaintiff's letter of the 26th of November, 1894, refers to several matters concerning the drain, and among them to the insufficiency of its south branch due to the cause therein mentioned, and to its being badly filled up from Harloff's Hill to the eastern end thereof. It does not state that by reason of its condition he was in any way injured, nor does it require the defendants to remove the defects by repairing the drain. Looking at the whole letter it seems to me that what the plaintiff really wanted was to have the drain so improved as to give it an increased fall, to be paid for by owners of lands then using it as an outlet

Judgment.

LISTER,
J.A.

Judgment. for their drains, but who had not contributed to its original cost.
LISTER,
J.A.

I think the test as to whether this letter can be looked upon as a sufficient notice to repair under section 73 is, could the defendants have treated it as a notice for the purpose of an application to the referee under sub-sec. (a) of sec. 73 to set it aside? It seems to me that such an application would fail if opposed by the plaintiff, who might well say this letter does not call upon the municipality to repair the drain, or that it does not state that the drain was causing injury to him or his property; in fact he might successfully contend that it was not, and was not intended to be, a notice under section 73. If it is not a notice under this section the referee would be without jurisdiction. Manifestly the notice must be one which comes within section 73; this, in my opinion, does not.

And it is, I think, quite clear that the notice of the 20th of November, 1897, cannot be regarded as a notice to repair under section 73. This notice was the commencement of proceedings taken under section 93 of the Municipal Drainage Act, and is a notice which the referee had no jurisdiction to deal with under sub-sec. (a) of sec. 73.

While I do not think that the notice to repair must be framed with technical precision I do think that it must inform the municipality with reasonable particularity of what is complained of in the way of non-repair, and what the municipality is required to do in respect of the matter complained of.

The appeal, in so far as the same relates to the liability of the defendants for damages, must be allowed with costs relating to this branch of the appeal, and the judgment must stand as regards the second branch of the appeal. The costs of the trial to be in the discretion of the Referee.

Appeal allowed in part.

R. S. C.

REGINA V. THE TORONTO RAILWAY COMPANY.

Constitutional Law—Justice of the Peace—Stated Case—Court of Appeal
—R. S. O. ch. 91, sec. 5.

A case can be stated by a justice of the peace under R. S. O. ch. 91, sec. 5, for the judgment of the Court of Appeal only when the constitutional validity of a statute is involved and not when the decision depends merely upon whether the statute is or is not applicable to the defendants. It was held, therefore, that an appeal, by way of stated case, would not lie from the decision of the police magistrate of the city of Toronto, that the Toronto Railway Company were bound by a by-law of the corporation, passed under the authority of the Municipal Act, directing them to put vestibules on their cars, the company contending that the by-law and the Municipal Act did not apply because their line crossed the lines of Dominion railways, thus making their undertaking a work for the general advantage of Canada and subject only to Dominion regulation.

THE following special case was stated by the police magistrate of the city of Toronto, under the provisions of R. S. O. ch. 91, sec. 5. Statement.

1. The Toronto Railway Company was incorporated by an Act of the Legislature of Ontario, 55 Vict. ch. 99.

2. Under the provisions of a by-law, No. 3280, passed by the corporation of the city of Toronto, the Toronto Railway Company were convicted by me on the 27th day of January, 1899, of a breach of the said by-law in not providing a certain car with the vestibule required.

3. The said by-law was passed by the said corporation under the powers conferred by sec. 569 (4) of the Municipal Act, R. S. O. ch. 223.

4. It was shewn before me that the tracks of the said the Toronto Railway Company crossed at certain places in the said city the tracks of the Grand Trunk Railway Company of Canada and the Canadian Pacific Railway Company, two of the railways mentioned in sec. 306 of the Railway Act, 51 Vict. ch. 29 (D.), and counsel for the said the Toronto Railway Company objected that the said company were, under the provisions of the Railway Act, a work for the general advantage of Canada and not subject to the operation or authority of the said Municipal Act of Ontario.

Statement. 5. I found the said company guilty of the offence charged in the information, but, at the request of counsel for the said company, I have stated this case: the question submitted for the judgment of the Court of Appeal being:

Whether the Municipal Act, R. S. O. ch. 223, sec. 569 (4), is constitutionally valid, and binding upon the appellants, the Toronto Railway Company, or are they, by reason of the above mentioned facts, not subject to the provisions thereof?

Upon this special case coming on for argument before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 13th of October, 1899, *Irving*, Q.C., for the Attorney-General of Ontario, took the preliminary objection that the constitutional validity of the sub-section referred to was not in question, and that there was no power to state a case.

Fullerton, Q.C., for the relator, supported the objection.

James Bicknell, for the appellants.

The argument on the merits was heard subject to the objection.

November 14th, 1899. BURTON, C.J.O.:—

Mr. Irving, for the Attorney-General, took the objection that the remedy, if any, was by appeal, or by motion to quash the conviction, and that it was not a case in which the magistrate was warranted in stating and signing a case under section 5 of R. S. O. ch. 91, and in considering the matter since the argument we think the objection is well taken.

The only case in which a party to the proceeding can apply to the justice to state a case, is when he is dissatisfied with the determination as being erroneous in point of law as regards the constitutional validity of the statute. In such a case, and in such a case only, he may, within a certain prescribed time, apply to him for that purpose.

Here, as I understand it, the constitutional validity of the statute is in no way impeached ; the only question was, did it apply to this work, or was the railway within section 306 of the Railway Act ? The magistrate held that it was not within that section, and if he is wrong in that view the defendants' course was to appeal.

We think the objection must prevail. Presumably the magistrate would not have stated a case, unless pressed to do so by the railway company, who attempted to support it in argument before us. The statute gives the Court full power to deal with the costs, and we think that under the circumstances the railway company having failed in their contention, should, as in ordinary cases, be visited with the costs.

Judgment.

BURTON,
C.J.O.

OSLER, J.A. :—

It is clear upon the face of the stated case that the magistrate had no authority under the Act to submit it, and we ought to be careful not to entertain such questions as have been argued in this matter, unless they come before us in a regular and authoritative way.

The Legislature, in the clause of the Municipal Act referred to, has used general language, not in any way professing to extend power to a municipality to act outside the sphere of its own jurisdiction. No one has suggested that any question of constitutional validity could arise in the application of the clause to provincial railways, and it does not profess to go further. The only question of law, or combined question of law and fact, is whether the Toronto Railway has, in the events which have happened, become a railway subject to the jurisdiction of Parliament. If it has, it is no longer subject to the clause of the Municipal Act. But that raises no question of the constitutional validity of the clause ; it is simply a question of its application to these defendants, and that we have no authority to entertain or decide in such a proceeding as the present. The question submitted no doubt asks us to do so, but in

Judgment. so far as it does that it exceeds the right given to the
OSLER, magistrate by ch. 91.
J.A.

The distinction between the questions whether an Act is *ultra vires*, or "constitutionally invalid," to use the phrase employed in ch. 91, and whether it is, in point of law, applicable to a given set of circumstances, or to certain persons or corporations, was pointed out and acted upon in *Monkhouse v. Grand Trunk R. W. Co.* (1883), 8 A. R. 637.

The only question we should answer if we assumed to answer anything, would be whether the Toronto Railway Company has become a work for the general advantage of Canada, not whether the clause of the Municipal Act is constitutionally valid.

We should, I think, simply decline to answer the question, and no order should be made as to costs.

MACLENNAN, MOSS, and LISTER, J.J.A., concurred in the result, and with BURTON, C.J.O., on the question of costs.

Case quashed.

R. S. C.

THE SUTHERLAND INNES COMPANY V. THE TOWNSHIP
OF ROMNEY.

*Drainage—Debentures—Maintenance—Embanking Work—Registration of
By-laws.*

Section 83 of the Drainage Act, R. S. O. ch. 226, directing that the time for payment of debentures issued for the cost of maintenance of a drainage work shall not exceed seven years does not apply to debentures issued for the cost of extending, improving, or altering a drainage work, and the municipality has the same power to issue debentures as in the case of an original drainage work.

Because in the course of the construction of a drainage work banks are formed with the spoil cast from the dredge, the work is not one within sub-sec. 2 of sec. 3 of the Drainage Act, R. S. O. ch. 226; that subsection relates to the reclamation of wet or submerged lands.

Semle: The provisions of the Municipal Act as to the registration of by-laws for contracting debts apply to by-laws for the issue of debentures for drainage works, and when such by-laws have been registered in accordance with the provisions of the Act they cannot be set aside even if originally *ultra vires*.

Judgment of FERGUSON, J., affirmed.

APPEAL by the plaintiffs from the judgment of FERGUSON, J., at the trial. Statement.

The action was tried at Chatham on the 17th and 18th of May, 1898, and on the 6th of September, 1898, the following judgment, in which the facts are stated, was delivered:—

FERGUSON, J.:—

On the 3rd of July, 1897, a by-law, based upon the report of an engineer previously obtained, was finally passed by the municipal corporation of the township of Tilbury West to provide for extending and for otherwise improving Big Creek in the townships of Tilbury North and Tilbury West and for borrowing on the credit of the municipality of Tilbury West the proportion of money to be contributed by Tilbury West for completing the work. According to this report several township municipalities were respectively required to contribute towards the cost of the work. The sum to be raised and paid by each such municipality was specified in the report and the manner of assessment of lands to raise the moneys required duly

Judgment. provided by the report, so far as I have been able to see
FERGUSON, J. in form at least in accordance with the provisions of the law
upon the subject. The work appears to be a large, extensive, and costly one, and, as was made to appear at the trial, has been proceeded with towards completion, or at least a very large amount of work has been in fact done.

The township of Romney was one of the municipalities to contribute towards the cost of the work (according to the report) and the council of the corporation of Tilbury West after having adopted the works so reported duly caused to be served upon the head of the municipality of the township of Romney, the report, plans, profiles, estimates, specifications, and assessments, in respect of the work as provided by the statute. Upon being so served it became the duty (under the drainage laws) of the township of Romney, to pass a by-law to raise and to pay over to the treasurer of Tilbury West their proportion of the money required for the work. But they had the right to appeal from the report instead.

As shewn by the evidence, the council of the township of Romney (although they might not have done so) sent a circular letter to each one of the ratepayers in their township, whose lands had been assessed in respect of the work, inviting an assembly of these for the purpose of considering the question as to whether they should adopt the report or appeal therefrom. The plaintiffs were thus notified and invited, but did not pay any attention to the matter so far as has appeared. A large number of such ratepayers, however, did assemble pursuant to the circular notice, and were given full opportunity to examine the report, profiles, specifications, assessments, and all that had been done; no one of them, however, raised any objection or in any way indicated an opinion that there should be an appeal.

After having taken this extra precaution to ascertain the opinions of the ratepayers interested the council of the township of Romney, by a by-law finally passed on the 11th of October, 1897, made provisions for the raising and

paying over of the township's share of the cost of the work according to the report. This by-law is the by-law of the township numbered 601, and it was duly registered under the provisions of section 351 of the Municipal Act of 1892, as before then amended by sec. 7 of 60 Vict. ch. 45, subsec. 1 (O.), on the 10th of November, 1897.

On the 30th of August, 1897, the defendants, the township of Romney, finally passed a by-law to provide for the improvement of No. 4 drain in the township and along the townline between the township of Romney and the townships of Tilbury East and Tilbury West, and its outlet in the east branch of Big Creek, in the township of Tilbury North, and for borrowing on the credit of the municipality the amount of the proportion of money to be contributed by the township of Romney for doing and completing the work. This by-law was based upon the report of an engineer previously obtained in the manner required by law and is by-law numbered 602 of the by-laws of the township of Romney. It was duly registered under the provisions of the Act on the 20th of September, 1897.

These plaintiffs gave notices in good time of their intention to move to have each of these by-laws quashed, but nevertheless did not in either instance make the motion to quash.

The plaintiffs also in each case, that is in respect of each of these by-laws, appealed to the Court of Revision and to the Judge of the County Court. In the appeal in respect to one of the by-laws the plaintiffs obtained some relief by a change being made in respect to their assessments and the other appeal was dismissed.

The action is brought to have it declared that the report as to the drainage works of Big Creek above referred to may be declared invalid and void so far as the same seek to charge the lands in Romney for any portion of the cost of the proposed drainage works on Big Creek and its branches; that the above-mentioned by-law number 601, of Romney, may be declared invalid and *ultra vires* as being

Judgment.
FERGUSON, J.

Judgment. beyond the power and jurisdiction of a municipality to pass, FERGUSON, J. and that it may be removed from the registry as a cloud on the plaintiffs' title, and the debentures issued under the by-law may be cancelled.

Also to have it declared that the report of the engineer upon the alleged further improvement of No. 4 drain may also be declared invalid and void and that by-law number 602, above mentioned, may also be declared beyond the jurisdiction of the defendant council to pass, and that it may be cancelled and quashed and removed from the registry, and debentures issued under it, if any, declared invalid, and that in any event the defendants be directed to protect and hold harmless the plaintiffs' lands from the assessments under these by-laws or either of them and from any debentures issued thereunder.

The plaintiffs also ask that the defendants be enjoined against further proceeding with either of the said by-laws 601 or 602, or disposing of any debentures issued thereunder, and that their registration be ordered to be removed from the registry office of the county of Kent.

As before stated, each of these by-laws was duly registered under the provisions of the statute. The notices required by sub-section 3 of section 352 have been shewn to have been duly given and published and so far as I can see all requirements and formalities in respect to such registrations were proved to have been complied with. By sec. 352, sub-sec. 1, of the Act of 1892, as amended by the Act of 1897, it is enacted that every such by-law (referring to the by-laws mentioned in section 351) so registered, or registered before the sale of such debentures, and the debentures issued thereunder, shall be absolutely valid and binding upon the municipality according to the terms thereof and shall not be quashed or set aside upon any ground whatever unless an application or action to quash or set aside the same be made to a court of competent jurisdiction within three months from the registry thereof and a certificate under the hand and seal of the clerk of the court stating that said action or

proceeding has been brought or application made shall Judgment.
 have been registered within the said period of three FERGUSON, J.
 months. As shewn by the evidence of McKean, the deputy
 registrar, the certificate of the pendency of this action was
 dated and registered on the 15th of February, 1898, more
 than three months after the latest of the registrations of
 these two by-laws. The evidence of the same witness shews
 that this one is the only certificate registered in respect to
 this or any other action, proceeding, or application, in
 regard to these by-laws or either of them. Each of these
 by-laws is a by-law for contracting a debt by the issue of
 debentures for a longer term than one year and for levying
 rates for the payment of such debt on the ratable property
 of a part of the municipality, and if nothing more were to
 be said, the matters in contention would, as I think, have
 to be decided against the plaintiffs on this short and single
 ground, namely, the due registration of these respective
 by-laws, and the want of registration, within the prescribed
 period, of any certificate of the pendency of any proceed-
 ing, or application, attacking them or either of them.

It was, however, contended on behalf of the plaintiffs,
 that the provisions regarding the registration of by-laws
 for contracting debts by way of issuing debentures, have
 no application to drainage by-laws such as these, or to any
 drainage by-laws, that expression being used and appar-
 ently fully understood.

After a perusal of all the statutes or enactments bearing
 on the subject I am not of this opinion. On the contrary,
 I think the provisions do apply, and (as I think), enough
 appears in the judgment in *Broughton v. Grey* (1897), 27
 S. C. R. 495 (a case apparently decided under the provis-
 ions of section 590 of the Act of 1892), to shew that such
 is the view taken by the Supreme Court. At p. 509, the
 learned Judge who delivered the judgment of the Court,
 in dealing with the question as to whether or not the
 action had been brought too early, and whether the plain-
 tiffs should not have waited till after the passing of the
 by-law instead of seeking to restrain the passing of it,

Judgment. said : " Greater difficulties might be raised to his seeking
FERGUSON, J. redress if the by-law should be, as it might, and no doubt would be, registered under sections 351 *et seq.* of the Municipal Act of 1892." It seems to me clear that the provisions regarding registration do apply. I can find no good reason for thinking they do not apply to what are called drainage by-laws. On behalf of the plaintiffs it was also contended that even if these provisions as to registration do apply to drainage by-laws they can only apply to such by-laws as there was jurisdiction or power to pass, and that each of these by-laws is *ultra vires*. The section 351, above referred to, is general and comprehensive in its terms. It says: " Every by-law passed by any municipality for contracting any debt," and it is silent as to the existence or not of the proper power to pass the by-law. Section 352 gives the period of three months in which to attack the by-law by an application or action to quash or set it aside, and positively provides that unless such application or action is made or brought, and the certificate registered within the period mentioned, the by-law shall not be quashed or set aside on any ground whatever, and that the by-law and the debentures issued under it shall be absolutely valid and binding.

These enactments seem very strongly to shew that a by-law so registered and not attacked and the certificate registered within the time prescribed is valid and binding even although the by-law is one that the municipality had not proper power to pass. Surely the fact of a by-law being *ultra vires* would be a ground of attack and section 351 says that in such circumstances the by-law shall not be quashed or set aside on " any ground whatever." If I had to decide the case on this short ground my opinion would be against the plaintiffs' contention, but I am not driven to decide this immediate point, for having thoroughly re-perused the evidence I am of opinion that the municipality of Romney had power to pass these by-laws. As to by-law 601 it was contended that in as much as the plaintiffs' lands in Romney lay very high and had a good

and sufficient outlet for their water independently of the improved outlet provided for by the by-law of Tilbury West, such improved outlet was not an improved outlet for the waters of these lands and that the land in Romney could not therefore be properly taxed in respect of the outlet or for "injuring liability."

The work provided for by the by-law of Tilbury West was a very extensive one, and was undertaken, as was said, under the provisions of section 75 of the Act of 1894. I think the witness Thomas Anderson, Clerk of the Municipality of Tilbury West, said not inaptly that it was a work for improving the drainage system. No doubt a very great improvement in the outlet was contemplated, and has virtually been made. The distance from this outlet at or near the waters of the lake to the plaintiffs' lands in Romney is stated to be about 13 miles. Some witnesses say a little more. There can be no doubt that a very large volume of water is discharged through it.

On the evidence the fall from the plaintiffs' land to the outlet is less than one inch in ten rods. On some of the evidence much less. This to me represents almost still water in the drain and if nothing more were urged I should be quite unable to perceive how any great enlargement and improvement of an outlet where this one is would not be and constitute an "improved outlet" *quoad* the plaintiffs' land. It was contended that notwithstanding there is only this small elevation of the plaintiffs' land above the outlet, yet that the conformation of the surface between the outlet and the plaintiffs' land was such that there was a good and sufficient outlet for the water from the plaintiffs' land independently of the improved outlet provided for and made under the by-law of Tilbury West. Evidence was given for the purpose of establishing this alleged fact. This evidence I heard, and I have since perused it carefully, and I think it utterly fails. It was very unsatisfactory evidence for the purpose, and as I think entirely insufficient, and I am of the opinion that the outlet in question is an "improved outlet" as to the plaintiffs'

Judgment.
FERGUSON, J.

Judgment. land. On all the evidence I am unable to perceive how
FERGUSON, J. this fact can be otherwise, and there is no doubt that
the plaintiffs use the outlet.

Sub-section 4 of section 3 of the Act of 1894 provides that all the lands and roads of any municipality, corporation, or any individual using any drainage work as an outlet, or for which when the work is constructed an improved outlet is thereby provided either directly or through the medium of any other drainage work or of a swale, ravine, creek, or water course, may, under all the formalities and powers contained therein, except the petition, be assessed and charged for the construction and maintenance of the drainage work so used as an outlet or providing an improved outlet.

Sub-section 3 makes provision for what is called "injuring liability."

Sections 59 and 60 of the same Act extend the principles of the provisions of sub-sections 3 and 4 to adjoining and neighbouring municipalities and provide for assessing and charging these. It seems to me clear on the evidence and the provisions of the Drainage Acts that there was power to assess and charge the plaintiffs' lands for a proper proportion of the cost of the works under the by-law of Tilbury West and that the municipality of Romney was not acting in excess of their powers in adopting that by-law and passing the by-law they did, namely, by-law 601, so far as assessing and charging the lands in Romney were concerned.

As to by-law 602: This is a by-law for improving a drain known as No. 4 drain. This by-law is an original by-law of this township in respect of a work in the township and on its boundary and I have discovered nothing to enable me to say that the municipality has not full power to legislate on the subject. The evidence shows, I think, that this was a work of improvement and extension done also under the provisions of section 75 of the Act of 1894. It is likewise an extensive work.

On behalf of the plaintiffs it was contended that the

provisions of section 83 apply, and that there was no power Judgment.
to provide for the issue of debentures payable in ten years, FERGUSON, J.
as was done in the cases of both by-laws, and that the
debentures should have been made payable within seven
years.

This contention rests upon the assumption that each of these works is a work of maintenance, such as is mentioned in this section 83. I am, however, of the opinion that such is not the case, and that each of the works must be considered as works of reconstruction, improvement, and extension, under the provisions of section 75, and not works of mere maintenance, such as are referred to in section 83.

There were some other contentions on behalf of the plaintiffs against the existence of the power to pass the by-laws, but I do not think any of them should succeed. These were of a minor character, and I do not think that any of them is tenable. I am on the whole case of the opinion that each of the by-laws 601 and 602 was within the power of the municipality of Romney to pass. Each was duly registered as before stated. The plaintiffs were too late in registering the certificate of *lis pendens*, if I may call it by that name. Each of these by-laws should stand as good and valid, and the plaintiffs' action must be dismissed with costs.

The appeal was argued before BURTON, C.J.O., MACLENNAN, MOSS, and LISTER, J.J.A., on the 3rd and 4th of October, 1899.

Atkinson, Q.C., for the appellants.

J. B. Rankin, for the respondents.

November 14th, 1899. The judgment of the Court was delivered by

LISTER, J. A.:—

I think the judgment of my brother Ferguson ought to be affirmed for the reasons there given.

Judgment.

LISTER,
J.A.

I shall add a very few words in respect of two points raised by the appeal on the part of the plaintiffs.

The first is that the by-laws are fatally defective in this, that they extend the time for payment of the debentures thereby authorized to be issued, beyond a period of seven years from the date thereof; and the other is that by reason of the dredging of a portion of Big Bear Creek, provided for in the engineer's report, and the formation of banks with the spoil cast from the dredge, the work was in fact an embanking drainage work within the meaning of sub-sec. 2 of sec. 3 of "The Drainage Act, 1894," and because the by-law authorizing the work was not founded upon a petition of two-thirds of the owners within the area as in that sub-section prescribed, the work was unauthorized and by-law 601 of the defendant municipality was *ultra vires* and is illegal and void.

Neither objection, as it appears to me, can be sustained.

The first is based upon section 83 of the Act which provides that "Where the maintenance of any drainage work is so expensive that the municipal council liable therefor deems it inexpedient to levy the cost thereof in one year, the said council may pass a by-law to borrow upon the debentures of the municipalities payable within seven years from the date thereof, the sum necessary for the work or its proportion thereof," etc.

Obviously this section relates to the issue of debentures to meet the cost of work in respect of maintenance, *i.e.*, the preservation and keeping in repair of a drainage work, which the municipality is under statutory obligation to preserve and keep in repair, and has no application whatever to debentures issued to meet the cost of extending, improving, or altering a drainage work, executed under the authority of section 75 of the Act, which confers upon the municipality doing that work the same powers as regards the issue of debentures to meet the expense thereof as is conferred by the Act for the expense of constructing an original drainage work.

And I think it is also clear that the embanking of that

part of Big Bear Creek authorized by the by-law of Tilbury West, cannot be looked upon as bringing the drainage work under sub-sec. 2 of sec. 3 of the Act, even although it may be necessary in order to make the work more effective.

Manifestly sub-sec. 2 of sec. 3 relates to the reclamation of wet or submerged lands by embanking and the operating of pumping works authorized by section 181 of the Act; in fact, just such works as are at present operated on the plains near Wallaceburg.

It may be proper to notice that during the argument it was stated by counsel for the defendants, and not contradicted by counsel for the plaintiffs, that the embanking added nothing to the cost of the work as it consisted merely of the spoil discharged from the spoon of the dredge.

The appeal must be dismissed.

Appeal dismissed.

R. S. C.

Judgment.

LISTER,
J.A.

NICHOL SCHOOL TRUSTEES V. MAITLAND.

Schools—Public Schools—Union School Section—Existence De Facto—Alteration of Boundaries—“Municipality Concerned”—R. S. O. ch. 292, secs. 42, 43.

There was no proof of the formation of the union school section in question, but it was shewn that for many years a lot in one township had been marked in the assessment roll as in a school section of the adjacent township, to which the taxes received in respect of that lot were paid; that in various reports and returns made by the school inspector the owner of the lot was treated as a ratepayer in respect of the school section of the adjacent township; that his children went to the school established there; and that in the township school map, prepared by the township clerk under the provisions of sub-sec. 4 of sec. 11 of the Public Schools Act, R. S. O. ch. 292, the lot was marked as in the school section of the adjacent township:—

Held, that the evidence was sufficient to shew that the union school section existed in fact and that section 42 of the Act applied to it, so that it must be deemed to have been legally formed.

History and object of that legislation discussed.

Proper corporate description of the trustees of a union school section pointed out.

A municipality in which there is any territory forming part of the union school section in question is “concerned,” within the meaning of section 43 of the Act, in any proceedings for the alteration of the section, and these proceedings must be based upon a petition of five ratepayers of this municipality, though not necessarily of ratepayers in the territory itself.

Judgment of STREET, J., affirmed.

Statement. APPEAL by the defendants from the judgment of STREET, J., at the trial.

The following statement of facts is taken from the judgment of MOSS, J. A.:—

There are three sets of plaintiffs, viz., the Board of Public School Trustees for Union School Section No. 3 of Nichol and West Garafraxa, the Board of Public School Trustees for School Section No. 5 of Pilkington, and five individuals, of whom one (Scott) is a resident and ratepayer of West Garafraxa; two (Mair and Broadfoot) are residents and ratepayers of Nichol, and two (Larter and McKay) are residents and ratepayers of Pilkington.

The defendants are residents and ratepayers in Nichol and Pilkington. In May, 1898, they petitioned the councils of their respective townships, under section 43 of the Public Schools Act, R. S. O. ch. 292, asking for the forma-

tion of a new union school section, to consist of certain lots and parts of lots in each township, and that for that purpose existing school sections or union school sections affected might be altered. Statement.

The township councils refused to grant the prayer of the petitions, and thereupon four of the defendants and one John Beattie appealed under section 44 to the county council. The county council entertained the appeal and passed a by-law appointing Joseph Jamieson, the junior judge of the county, and Edward Dynes and George Robinson, arbitrators, who made the award impeached in this action. The plaintiffs claimed that before and at the date of the commencement of the proceedings leading to the making of the award, and at the time when it was made, there was in existence Union School Section No. 3 of Nichol and West Garafraxa, comprising a number of lots and parts of lots in Nichol, and one lot (No. 2 in the 1st concession, containing 137 acres) in West Garafraxa. The award has altered the boundaries of this section as regards the lots and parts of lots in Nichol, so that it no longer comprises the same territory as before the award. There was no petition by ratepayers from West Garafraxa, and no action by the township council.

The plaintiffs contended that West Garafraxa was a municipality concerned within the meaning of section 43, and that there could be no alteration of Union School Section No. 3 of Nichol and Garafraxa, unless there was a petition of five ratepayers of the municipality praying the township council to make such alteration, followed by proceedings for the appointment of arbitrators under either section 43 or section 44; and they claimed that for want of these preliminaries the award made was invalid and void.

The defendants denied that there was any such Union School Section as No. 3, and claimed that School Section No. 3 was an ordinary school section in Nichol, and that lot 2 in the 1st concession of West Garafraxa formed no part of it, and that, therefore, West Garafraxa was not

Statement. concerned. They also contended that even if there was a Union School Section No. 3 comprising lot 2 in the 1st concession of West Garafraxa, the proceedings and award were proper without a petition from five ratepayers of the municipality to the township council, or any proceedings by that township.

The action was tried at Guelph on the 21st of November, 1898, before STREET, J., who held, first, that School Section No. 3 was an existing union school section, and that it comprised lot 2 in the 1st concession of West Garafraxa; and, second, that West Garafraxa was a municipality concerned under section 43, and accordingly gave judgment in the plaintiffs' favour.

The appeal was argued before BURTON, C.J.O., MACLENNAN, MOSS, and LISTER, JJ.A., on the 21st of September, 1899.

Johnston, Q.C., and *A. H. Macdonald*, Q.C., for the appellants. There was in fact no union school section, but even if there was, the township of Garafraxa was not "concerned," within the meaning of the Act, in the proposed alteration. "Concerned" is not nearly so wide a word as "interested:" *American and English Encyclopædia of Law*, 2nd ed., vol. 6, p. 430; *In re Ness and Township of Saltfleet* (1856), 13 U. C. R. 408; *McRossie v. Provincial Ins. Co.* (1873), 34 U. C. R. 55; *Re Townships of Harwich and Raleigh* (1890), 20 O. R. 154; *In re Townships of Romney and Tilbury West* (1891), 18 A. R. 477.

W. R. Riddell, and *Hugh Guthrie*, for the respondents. There was a union school section in fact, and the Act applies: *Boyd v. Bobcaygeon* (1878), 43 U. C. R. 35. The description, even if it was incorrect, is not of any importance. Each township, any part of the territory of which forms part of the school section in question, is concerned in any alteration of the section. The right cannot be limited to townships whose territory will be directly affected, and all the ratepayers in the township, and not

merely the ratepayers in the specific section are entitled to Argument.
act. See *Wawanosh v. Lockhart* (1896), 27 O. R. 345 ;
Re Martin and County of Simcoe (1894), 25 O. R. 411.

Johnston, in reply.

November 14th, 1899. The judgment of the Court was delivered by

Moss, J.A. :—

No formal record of the creation of Union Section No. 3 was produced or shewn to have an existence, but proof was given of many dealings and proceedings made and taken upon the footing of the existence of such a union section. Lot 2 in the 1st concession of West Garafraxa has for many years been marked in the assessment roll of the township of West Garafraxa as in Nichol Union. The school rates levied by the trustees of School Section No. 3 upon this lot were, when collected by the township collector and paid over by him to the township treasurer, remitted by the latter to the treasurer of Nichol, who added them to the rates levied in Nichol in respect of the portion of Section No. 3 in that township, and transmitted them to the secretary-treasurer of the school section. A triennial equalization and determination of the proportion of the annual requisition made by the trustees that should be levied upon and collected from the taxable property of Nichol and West Garafraxa in respect of this union section was made from time to time pursuant to the School Act, and was acted upon by assessors and collectors. In various reports and returns made to the township authorities and the school inspector, the proprietor of lot 2 in the 1st concession of West Garafraxa has been recognized and treated as a ratepayer of Union School Section No. 3 in Nichol, and his children attended the school in that section.

The clerk of the township of West Garafraxa produced a map, which he said was the school map of the township prepared by him under the direction of the council, and in

Judgment.

Moss,
J.A.

which he marked lot 2 in the 1st concession as in the union section. The map was made out of a township map, and in making it he marked this lot off as in the union section from seeing it so dealt with in the assessment rolls. It is part of the duty of the clerk of every township to prepare in duplicate a school map of the township shewing the divisions of the township into school sections and parts of union school sections, to furnish one copy of such map to the county clerk for the use of the county council, and retain the other in the township clerk's office for the use of the township corporation : section 11 (4).

Whether the map produced was prepared in duplicate and one copy furnished to the county clerk does not appear. The contrary has not been shewn, and it ought to be assumed that the clerk did his whole duty. The map shews lot 2 in the 1st concession to be owned partly by one R. Wilkie, and partly by one T. Wilkie, with one Wood as tenant, but from the evidence it appears that the plaintiff Scott, who is now the owner, was first assessed for it in 1892.

The object of the preparation of such a map must be to exhibit to all parties interested the lots and portions of lots comprised within the respective sections or parts of union sections. It is a public document retained in the clerk's office for the use of the township corporation, that is, the inhabitants of the township as declared by section 5 of the Municipal Act.

The map in question was produced from the proper custody, and may well be received as *primâ facie* evidence of the divisions into school sections and parts of union school sections, as somewhat similar maps were received in the cases of *In re Shorey and Thrasher* (1870), 30 U. C. R. 504, and *School Section No. 24 v. Township of Burford* (1889), 18 O. R. 546.

The evidence is sufficient to shew that on the 1st of January, 1891, and probably for years before that date, and up to and on the 1st of April, 1896, Union School Section No. 3 existed in fact, whether formed in accordance with

the provisions of the law in that behalf or not. That being so, sec. 85 of the Public Schools Act, 1891, 54 Vict. ch. 55 (O.), and sec. 42 of the Public Schools Act, R. S. O. ch. 292, apply to it, and it is to be deemed to have been legally formed.

Judgment.

Moss,
J.A.

These sections owe their origin to a mistake made in 1874 in consolidating the Public School Law, 37 Vict. ch. 28 (O.), whereby the provision theretofore existing in the school law for the formation of union school sections was omitted. Between the date of the 37 Vict. ch. 28 and the 2nd of March, 1877, several union school sections were formed, and the legality of some of them having been questioned, the Court adjudged against their validity: *Halpin v. Calder* (1876), 26 C. P. 501; *Askew v. Manning* (1876), 38 U. C. R. 345.

To remedy this defect of the law, and to validate the existence of the union school sections so formed, sec. 11 of 40 Vict. ch. 16 (O.), was passed on the 2nd of March, 1877: *In re Petition of Minister of Education* (1877), 28 C. P. 325; *Boyd v. Bobcaygeon* (1878), 43 U. C. R. 35.

The provision of sub-sec. (4) of sec. 11 has ever since been continued in the general Acts relating to Public Schools without any material alteration, except as to the date of its application which has always been made to cover the cases up to the date of the latest Act.

It may be that when originally passed it was not anticipated that it would be made applicable to a case like the present, but, nevertheless, I think it comes under what Armour, J., in *Boyd v. Bobcaygeon*, termed "the wide words of this remedial Act."

I therefore agree with the learned trial Judge that before and at the date of the impeached proceeding there was a validly existing Union School Section No. 3, comprising lot 2 in the 1st concession of the township of West Garafraxa, together with other lots and parts of lots in Nichol.

It was urged that the school trustees of this union school section never assumed or adopted the name of union school section, and that their corporate seal has the impress "Trustees' School Section No. 3," without more.

Judgment.

Moss,
J.A.

The School Act makes no special provision respecting the corporate name of union school sections.

"School section" is defined to mean the municipality or any portion thereof, or any portion of two or more municipalities under one public school corporation : section 2 (5).

Section 9 provides that the trustees of every school section shall be a corporation under the name of "The Board of Public School Trustees for School Section of the township of in the county of ."

This seems to warrant, if not to make obligatory, the use of this statutory title by trustees of union school sections.

Then there being an existing union school section comprising some territory in West Garafraxa, it is not easy to see why West Garafraxa is not a municipality concerned under section 43. This must mean concerned in the formation, alteration or dissolution of a union school section which is partly composed of some portion of the territory of the municipality. It cannot but be affected by any change of an existing union section which is of this character. And it must surely be interested in any proceedings proposed to be taken with the view of affecting a change. The alteration may result in throwing back into one municipality territory which hitherto has been in a union section, with the school house situated in another municipality, and may thus call for a rearrangement of the school sections in the first municipality. Could it be fairly said that it would not be concerned in a proceeding which would affect such a change? It would certainly be affected by such a proceeding, and possibly much interested in its result.

I think a municipality must be deemed to be concerned in any proceeding affecting the alteration of a union school section in which there is territory forming part of such municipality, which may be affected by the result of the proceedings.

And I think that any proceeding having or tending to have the effect of altering Union School Section No. 3 of

Nichol and West Garafraxa ought to be based upon a petition of five ratepayers of West Garafraxa as well as of Nichol.

Judgment.

Moss,
J.A.

At first I was inclined to think that the ratepayers mentioned in section 43 were required to be ratepayers in the portion of the municipality comprised in the union school section, and if so, there was a difficulty in this case, because there were not five ratepayers in West Garafraxa answering this description.

But further consideration, and a reference to the different sections of the Act in which ratepayers are spoken of, have led me to the conclusion that in section 43 the words "ratepayers of the municipality" mean ratepayers generally. And the reason why it should be so seems tolerably plain. The ratepayers in the part of the township territory embraced in a union section might feel perfectly satisfied to remain there, while it might appear to other ratepayers of the township that it was desirable and in the general interest that there should be a rearrangement of the school sections involving an alteration or dissolution of the existing union sections or some of them.

Unless the outside ratepayers may act under section 43, they would appear to be powerless to make any change.

On the other hand, the ratepayers in the territory of the union school section are not without remedy against action taken by the outside ratepayers, for section 44 expressly gives a right of appeal to the county council by five ratepayers in the territory or union section concerned.

The respondents urged other grounds for supporting the judgment, but agreeing as I do with the learned trial Judge, it is not necessary to deal with them.

I think the appeal should be dismissed.

Appeal dismissed.

R. S. C.

HUFFMAN V. TOWNSHIP OF BAYHAM.

TANNER V. TOWNSHIP OF BAYHAM.

Municipal Corporations—Highway—Obstruction—Negligence—Damages.

A milkstand built on a highway by an adjoining proprietor and projecting slightly over the travelled way is such an obstruction to the highway as to constitute want of repair within the meaning of the Municipal Act, and where such an obstruction was shewn to have existed for three years and the municipal corporation having jurisdiction over the road in question had taken no steps to have it removed they were held liable in damages for an accident caused by it.

Castor v. Uxbridge (1876), 39 U. C. R. 113, considered and approved.

Quantum of damages for death of a child discussed.

Judgment of ROBERTSON, J., varied.

Statement. THESE were appeals by the defendants from the judgment of ROBERTSON, J., and were argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 29th and 30th of May, 1899.

Osler, Q.C., and T. G. Meredith, for the appellants.

D. J. Donahue, and W. E. Stevens, for the respondents.

October 2nd, 1899. The judgment of the Court, in which the facts are stated, was delivered by

LISTER, J.A.:—

The plaintiff Tanner sued for personal injuries, and the plaintiff Huffman sued as administrator of Laura Nella Huffman, his daughter, under the Fatal Accidents Act, for personal injuries sustained by her, which resulted in her death.

The facts in both cases were the same and they were tried together.

The plaintiff Tanner was the only person who could give an account of how the accident happened, and he in substance testified: That on the evening of the 24th of October, 1897, he and the deceased Laura Nella Huffman, were driving in a westerly direction on their way to

Aylmer on the road between the first and second concessions of the township of Bayham in a top or covered buggy drawn by a single horse driven by him, and when in front of lot, number three, owned by the defendant Weaver, the buggy came in collision with an obstruction on the north side of the road and he and the deceased were violently thrown from the buggy upon the ground, he being seriously injured and the deceased receiving injuries which, it is said, resulted in her death. That the buggy immediately after the accident was found turned upside down resting on its hood or cover. That he turned it down on its left side and that the rug and whip were found at the side of it. That the evening at the time of the accident and for some time before, was, owing to a dense fog, very dark ; and that at the time of the accident he was driving at the rate of from five to six miles an hour, and with the object of avoiding vehicles going in an opposite direction, kept to the north side of the road.

The evidence established that the obstruction complained of consisted of a milkstand which the defendant Weaver had for his own purposes, about three years before, removed from the south side of the road in front of his own farm to the north side thereof. It was solidly built upon posts sunk into the ground to a depth of about two feet, and stood about three feet high ; the south end of it projected in and upon the travelled way. The right side of the buggy indicated that it had come in violent contact with some object ; the fore axle was bent back, the cross bar of the shaft was broken away, and the end of the whipple-tree and the iron were torn off.

The top or cover of the buggy and the outside braces used to hold it up were uninjured. Evidence was given for the defendants tending to support their contention that the accident was not caused by the obstruction, but by the horse turning from the road into the ditch on the south side thereof at a distance of about one hundred and thirty-eight feet east of the stand, and that the buggy was dragged on its side from there to the place where it was found, and it

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LISTER,
J.A.

Judgment. was contended *inter alia* that the road was not by reason of the obstruction out of repair within the meaning of the statute.
LISTER,
J.A.

The learned trial Judge found (1) that the milkstand was erected by the defendant Weaver with the knowledge of the defendant corporation; (2) that the milkstand was an obstruction which rendered the road unsafe for travel; (3) that the erection was the cause of the accident; and (4) that there was no contributory negligence on the part of Tanner or the deceased. He gave judgment for the plaintiff in each action, assessing the damages of the plaintiff Tanner at \$500, and of the plaintiff Huffman at \$2,500.

This appeal brings up again the question as to how far a municipal corporation is guilty of a neglect of the duty imposed by section 606 (1) of R. S. O. ch. 223, which requires it to keep in repair the highways within its limits, if it knowingly permits to remain in the highway an obstruction placed there by a stranger, or is negligently ignorant of its presence there, and which obstruction renders the highway unsafe for travel.

For the defendant corporation it was contended that the obstruction complained of did not constitute a want of repair within the meaning of section 606 (1), for which it is responsible, in other words, that the duty imposed by the section is to keep in repair the way itself, and that no liability arises in respect of injuries occasioned by an obstruction placed upon the highway by a stranger.

This question was distinctly raised in the case of *Castor v. Uxbridge* (1876), 39 U. C. R. 113, where the English, American, and Canadian cases up to that time are collected, and the subject is there exhaustively discussed by the late Chief Justice Harrison.

In that case the plaintiff sued to recover damages for personal injuries caused by the vehicle in which he was being driven coming in contact with a telegraph pole lying with others along and on the travelled way.

"If," said the learned Chief Justice, at p. 127, "the defen-

dants here had notice of the nuisance, or were negligently ignorant of it, they are liable to be sued. There was nothing latent about the poles. They were not only visible, but allowed to remain after an officer of the corporation had knowledge of their situation. So far as we can see, there was plenty of room for the placing of the poles without at all encroaching upon the travelled part of the road. The corporation might at all events have compelled their removal off the travelled part of the road, but did not do so." And again, at p. 128, he said: "If this question had on the evidence been submitted by the learned Judge to the jury, and they had found in favour of the affirmative, I would not have felt inclined to interfere with the verdict. And sitting as a juror I think I am warranted by the evidence in finding in the affirmative of the question."

Judgment.

LISTER,
J.A.

While it is true that the decision in that case did not turn upon the point as to whether the poles constituted a want of repair of the highway within the meaning of the statute, but upon the other question raised, viz., contributory negligence on the part of the plaintiff, it is to be borne in mind that the defendants' neglect of duty was raised, considered and determined, and, as it appears to me, the observations of the learned Chief Justice in respect of this branch of the case cannot be regarded as mere *obiter dicta*.

The proposition there enunciated, it may be noticed, has never been overruled, but on the contrary has been approved by this Court in at least one case, and in other cases has by Judges of this Court been cited and referred to with approval.

In *Maxwell v. Clarke* (1880), 4 A. R. 460, at p. 465, it was said by the late Mr. Justice Patterson, who delivered the judgment of the Court: "The case of *Castor v. Uxbridge* established no new principle; it merely applied the well established doctrine in a case where the safety of travellers on the highway was endangered by obstacles placed upon the road by a stranger, just as it might have been endangered by an excavation made in the highway by a

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LISTER,
J.A.

stranger, the effect in either case being to put the road out of repair," and in *Rice v. Whitby* (1898), 25 A. R. 191, at p. 197, my learned brother Osler, said: "I understand the law of this Court in relation to such a claim as forms the subject of this action to be in accordance with what is laid down in the headnote to *Castor v. Uxbridge*, viz., that municipal corporations are responsible for damages caused to travellers by obstructions placed upon the highway by wrongdoers, of which the corporation have or ought to have knowledge, and that the road is out of repair when by the existence of such obstructions it is rendered unsafe or inconvenient for travel": and see *O'Neil v. Windham* (1897), 24 A. R. 341; *McKelvin v. London* (1892), 22 O. R. 70; *Foley v. Flamborough* (1899), 26 A. R. 43. See also R. S. O. ch 223, sec. 609 (1).

The present case clearly falls within the rule in *Castor v. Uxbridge* and it seems to me that this Court is obliged to accept that rule as the law until otherwise determined by a higher Court.

The remaining questions to be considered are purely questions of fact upon which the learned trial Judge has made findings adverse to the defendants.

There can be no doubt that when a case has been tried by a Judge without a jury, this Court upon appeal is called upon to review the whole case, and to render the judgment which in its opinion should have been rendered by the Court below. But it is well settled that an Appellate Court ought not to disturb the findings of the trial Judge who saw and heard the witnesses testify unless satisfied that the result reached is upon the whole evidence erroneous.

Whether the defendant corporation had or had not actual notice of the obstruction is, I think, in the present case, immaterial. The evidence established that it had been in the *locus in quo* for some three years. Notice under these circumstances will be imputed to the corporation whose duty it is to keep the road in repair. In other words it must be presumed to have notice of such defects

as it might have discovered by the exercise of reasonable diligence. Judgment.

The trial Judge found upon evidence which in my opinion justifies the finding that the highway at the *locus in quo* was at the time of the accident by reason of the milkstand dangerous to persons travelling thereon. The road was therefore out of repair within the meaning of the statute.

Then was this obstruction the cause of the accident?

After a very careful examination of the evidence I have reached the conclusion that it was. I agree with the learned trial Judge that the situation and condition of the buggy after the accident point very strongly indeed to the truth of Tanner's evidence, and are inconsistent with the theory of the defendants that the accident was caused by the buggy upsetting in the ditch on the south side of the road.

The evidence, I think, fails to establish contributory negligence either on the part of Tanner or the deceased. It cannot be said that driving at the rate of from five or six miles an hour on an old and much travelled road, even on a very dark night, without knowledge of any defect or obstruction in the highway, is *per se* negligence. I am unable to discover any ground that would warrant a reversal of the judgment of the trial Judge. The evidence on the part of the plaintiffs, if believed by him, as it appears to have been, is amply sufficient to support the conclusions arrived at by him.

I think the damages in the Huffman action ought to be reduced to \$1,500. The settled rule in actions of this kind is that a plaintiff is entitled to recover such damages only as may have been sustained by being deprived of the services of the deceased. The learned trial Judge in determining the amount to be awarded proceeded upon the hypothesis that the deceased but for the accident which caused her death would have lived for ten years, and would have continued to serve the plaintiff for the whole of that period, and the sum awarded was intended to be and is sufficient to purchase an annuity of \$300 a year for ten years. Under the circumstances of this case, and

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Judgment.

**LISTER,
J.A.**

considering the many things that might happen long before the expiration of that period that would deprive the plaintiff of her services, or render them no longer necessary to him or his wife, it seems to me that assuming the deceased would be worth \$300 a year to the plaintiff while she served him, \$2,500 is an unreasonably large sum. The sum of \$150 per year for ten years appears to be the sum at which the trial Judge at first determined to assess the damages, and I think applying the rule to the facts here, this is a reasonable and fair amount.

This sum must be divided equally between the plaintiff Huffman and his wife, the mother of the deceased.

The appeal in *Tanner's* case must be dismissed with costs. The judgment in *Huffman's* case will be varied by reducing the damages from \$2,500 to \$1,500, to be divided equally between the plaintiff and his wife, and the appeal to that extent allowed with costs to the appellants to be set off against the damages.

Appeal in Tanner's case dismissed.

Appeal in Huffman's case allowed in part.

R. S. C.

ATKINSON V. CITY OF CHATHAM.

Municipal Corporations—Bell Telephone Company—Highway—Obstruction Indemnity.

Under its Acts of incorporation the Bell Telephone Company is authorized, with the consent of the municipal council interested, and under the supervision of the engineer of the municipality, or of such other officer as the municipal council may appoint, to erect and maintain poles along the sides of any street, but so as not to interfere with the public right of travelling on and using the street. Under an agreement with the municipal council of the defendants, the company erected a line of poles in one of the streets of the city, one pole being placed in the travelled portion of the street. The defendants had no engineer, and did not appoint any officer to supervise the erection of the poles, but there was some evidence that the work had been done under the supervision of an officer of the defendants known as the "street surveyor," who discharged the duties usually discharged by an engineer of a municipality. The pole was allowed to remain in the street for several years, and the plaintiffs were injured by coming into collision with it, while lawfully using the street:—

Held, affirming the judgment of FERGUSON, J., 29 O. R. 518, that the pole was an illegal obstruction in the highway, which was therefore out of repair within the meaning of the Municipal Act, and that the defendants, having neglected to remove it, were liable in damages.

Held, also, reversing the judgment on this point, that the pole had not been erected under the supervision of the proper officer, and that the defendants were entitled to indemnity from the Bell Telephone Company.

Per MACLENNAN, J.A. The right to indemnity would exist even if the pole had been erected with the sanction of the defendants, and under the supervision of the proper officer.

THIS was an appeal by the defendants from the judgment of FERGUSON, J., reported 29 O. R. 518, where the facts are stated, and was argued before BURTON, C. J. O., MACLENNAN, MOSS, and LISTER, JJ.A., on the 26th and 27th of May, 1899. Statement.

Aylesworth, Q.C., and *Douglas*, Q.C., for the appellants.

Matthew Wilson, Q.C., and *J. G. Kerr*, for the third parties, the Bell Telephone Company of Canada.

Atkinson, Q.C., for the plaintiffs.

November 14th, 1899. MACLENNAN, J.A.:—

The learned Judge has found upon the evidence that the accident was caused by collision of the sleigh with the telephone pole, and without any contributory negligence

Judgment. on the part of the plaintiffs, and I think that finding is warranted, and ought not to be disturbed.
MACLENNAN,
J.A.

The action is against the city, and the first question is whether it is liable for permitting the pole to stand where it was. The Bell Telephone Company has been brought into the action as a third party by the city, claiming indemnity, and if the city is held liable, the further question is whether it is entitled to a judgment of indemnity against the Bell Telephone Company. The learned Judge has held the city liable, but not entitled to indemnity. The pole was erected in or about the year 1893, by the Bell Telephone Company for the purposes of their telephone business, and remained there until December, 1897, when the accident occurred.

The street is sixty-six feet wide. The pole stood eleven and a-half feet from the centre line, or twenty-one and a-half feet from the north-west limit, and is said to be eighteen inches in diameter. *Prima facie* it was an unlawful obstruction and nuisance upon the street, and having stood there for four years, with the knowledge of the city corporation, they must be held liable for the accident, unless they are able to shew that it was placed and maintained where it stood by competent authority. The authority relied upon is the legislation relating to the Bell Telephone Company. The Act incorporating that company is a Dominion Act, 43 Vict. ch. 67, amended by 45 Vict. ch. 95, sec. 2. That Act, section 3, authorizes the Bell Telephone Company to erect and maintain a line or lines of telephone along the sides of, and across, any streets, provided they shall not interfere with the public right of travelling on or using them. In cities or towns they are not to erect any pole higher than forty feet above the surface of the street, nor carry more than one line of poles along any street, without the consent of the municipal council. The opening up also of a street, for the erection of poles, is to be done under the direction and supervision of the engineer, or such other officer as the council might appoint, and in such manner as the council might

direct. In 1882, in order to remove doubts, the company obtained from the Ontario Legislature an Act, 45 Vict. ch. 71, conferring upon them the same powers as above mentioned, and expressed in the same terms, except that the Ontario Act requires the consent of the council to enable them to construct even a single line along a street. The Dominion Act, 45 Vict. ch. 95, amends the Act, 43 Vict. ch. 67, by requiring that the location of the line, as well as the opening up of the street, for the erection of poles, shall be done under the direction and supervision of the engineer, or other officer appointed by the council, and in such manner as the council might direct. The pole in question is more than forty feet high, and therefore the consent of the council was requisite, both under the Provincial and the Dominion Acts. There is, however, no question of consent, for by a by-law, and also by an express agreement by deed between the city and the company, both of the 20th of February, 1893, permission was granted to the company by the city to erect, under the supervision of the town engineer or other officer of the corporation appointed for the purpose, poles of a greater height than forty feet, wherever necessary for the purposes of the company. Now, while the company had authority to erect a line of poles on the street, and to make them over forty feet high, they could not place them elsewhere than along the sides, nor in such a position as to interfere with the public right of travelling on, or using it. To place them otherwise would be unlawful, as unlawful as if they had no authority whatever to erect them upon the street. The requirement to place them along the side of the street is not very precise. Anywhere not upon the middle line, would be literally along the side. But then the prohibition of interference with public travel and use is absolute. The two requirements must be read together, and in connection with the permission, in order to ascertain the intention of the Legislature; and I think the meaning is this: The company may erect a line of poles, but it must be along the sides of the

Judgment.
MACLENNAN,
J.A.

Judgment. street, and so as to interfere as little as possible with
MACLENNAN, public travel and use of the street. The public right is to
J.A. travel upon, and use the street with safety; therefore, the poles must be placed along the side or sides, so as to give the public the largest possible degree of safety, consistent with their existence; anything short of that is not a compliance with the legislation. The question then is, whether the pole in question was erected where it stood, along the side, and with due regard to the safe use of the street. The learned Judge has found that it was not. In that respect I agree with his conclusion, and with the reasons which he gives for it. I think it is very evident that it was a dangerous obstruction where it stood, and that it would have been very much less dangerous if placed near the sidewalk, instead of being within eleven and a-half feet of the centre of the street. A person driving westward required to make a turn of sixty degrees, at least, in a distance of sixty-one feet in order to avoid a collision. Inasmuch, therefore, as the pole was placed in a dangerous position, when it might have been placed in one much less dangerous, it follows that the city is responsible for the accident, because it was their duty to remove it. The judgment against the city must therefore be affirmed, and their appeal as against the plaintiffs must be dismissed.

The further question is whether the city is entitled to a judgment of indemnity against the Bell Telephone Company as provided by section 609 (1), (2), of the Municipal Act. It is clearly a case of an obstruction on a highway made and maintained by the company, and the city having been held liable, it has *prima facie* under that section a right to a remedy over against the company for the damages and costs recovered by the plaintiffs. The learned Judge has held that the company is not liable to indemnify the city, on the ground that the pole was placed where it stood under the superintendence of the corporation and with its sanction, that is to say, as provided in the statute, and in the agreement of the 20th of February, "under the direc-

tion and supervision of the engineer, or such other person as the council may appoint." There was apparently no such officer of the corporation as an engineer, as there might have been by virtue of the Municipal Act then in force, 55 Vict. ch. 42, sec. 495 (1) (O.); nor was any person expressly appointed for the purposes of the statute incorporating the Bell Telephone Company, or of the agreement which had been entered into with that company. But the learned Judge is of opinion that an officer called a street surveyor sufficiently answered the language of the contract and statute, that the pole in question was placed under his direction and supervision, and that the corporation should not be permitted to say that it was put up without their sanction.

Judgment.
MACLENNAN,
J.A.

The question then is, whether upon those facts, and that finding, the Bell Telephone Company is free from the statutory liability to indemnify the city.

In order to determine this question it must be carefully borne in mind that whether there was consent and approval by the city or not, the placing and maintaining of the pole in question where it stood was illegal; it was an obstruction placed and maintained by the company in a public street. The obligation so to place the line of poles as to interfere as little as possible with travel upon, and use of, the streets by the public, was absolute, and could not be qualified by the direction and supervision of the engineer or other officer. Both the city and the company were equally bound by that obligation, and I think it is plain that if the plaintiffs had sued the company they would have been entitled to recover just as they are entitled to recover against the city. When the statute says that the location of the line shall be under the direction and supervision of the engineer, etc., it does not authorize either the city or the company to disregard the public safety. It may be said that so to hold puts both corporations in a position of difficulty and hardship. That may be, yet it is just. The company, and perhaps the city, want to establish a telephone system, and

Judgment. for that purpose to erect poles upon the street. The
MACLENNAN, Legislature authorizes that to be done, but the danger to
J.A. the public must be as little as possible, and they must see
to that at their peril. They accept and exercise the
privilege granted, upon the prescribed condition, and there
is no real hardship.

Assuming then, that the pole was placed with the knowledge and consent of the city, does that bar the claim of indemnity? The statute makes no such exception, but declares that if an action is brought against a municipal corporation for damages by reason of an obstruction in a street placed by another corporation, the municipal corporation shall have a remedy over against the other corporation for damages and costs recovered. The enactment assumes liability by the municipal corporation for the same obstruction, which must either be for consenting to its being placed there in the first instance, or for allowing it to remain. It is a case of joint *tortfeasors* committing and continuing the same wrong, and the Legislature has said, in that respect changing the rule of the common law, that the municipality shall be entitled to indemnity. I therefore think that upon the very language of the statute, even if the city has expressly assented to the placing of this pole, it would be no bar to its claim for indemnity.

But I am of opinion that it ought not to have been held that the statute and the agreement between the parties had been complied with by the company in the location of the line under the direction of the engineer or other officer, etc. When the agreement was made, the corporation had not appointed an engineer, and yet that was the officer named in the agreement; apparently there was no thought of leaving the matter to the street surveyor, I mean no thought by the council as such. When, therefore, the company desired to locate its line, it was bound to require the council to appoint an engineer, or some other officer, to direct and supervise it. The council could not dispense with that condition, for it was a statutory condition, as

well as one contained in the contract, and intended for the benefit and protection of the public. The company made no such application, and the council never acted, and no consent or approval was ever given by it to the planting of the pole in question where it was placed. In the absence of any such consent, and of any direction or supervision by an engineer or other officer appointed by the council, the case is clearly within section 609 of the Act, and in my opinion the company is liable to indemnify the city.

Judgment.

MACLENNAN,
J.A.

The appeal of the city against the Bell Telephone Company ought, in my opinion, to be allowed with costs, and they should have judgment for indemnity for the damages and costs recovered by the plaintiffs.

Moss, J. A. :—

Upon this appeal two questions were presented for decision, first, the question of the defendants' liability to the plaintiffs, and second, the question of the third parties' liability over to the defendants.

The conclusions of the learned trial Judge, as gathered from the report in 29 O. R. 518, may be summarized as follows: (1) The pole against which, as was alleged, the sleigh, driven by the son of the plaintiff Stevens, struck, stands about sixty feet southward from the angle or bend of King street where it turns south and at the distance of about twenty-one feet from the westerly margin or limit of the street, which is of the usual width of sixty-six feet; (2) the street between the angle and the place where the pole stands was not in bad condition but was fairly good; (3) the pole was an obstruction on the street standing so far out and as near the middle of the street in the city of Chatham as it did; and the street at this point, from this cause alone was out of repair, was not in good or reasonable repair; (4) the corporation of the city of Chatham had knowledge and notice not only of the fact that the obstruction existed, but that it was considered by

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Moss,
J.A.

some at least to be of a dangerous character; (5) the cause of the accident was the sleigh striking the pole while the horses were going around the curve at a high rate of speed without any fault of the driver; (6) the accident was due to the defendants' negligence, and the injury would not have happened but for the obstruction in the street; and (7) there was no contributory negligence.

These conclusions are well supported by the evidence and ought not, in my opinion, to be disturbed.

There can be no doubt, I think, that the pole situated where and as it was in a public highway in the city of Chatham, was an obstruction upon such highway, and apart from the actual notice and knowledge brought home to the council, its occupancy of the position it was in from 1893 constituted it a want of repair of the highway, for the consequences of which the defendants were properly held to be liable in damages. But for the company's Acts of incorporation, 43 Vict. ch. 67 (D.), and 45 Vict. ch. 95 (D.), the erection or placing of poles anywhere on the highway would have been an obstruction and a public nuisance: *Regina v. United Kingdom Electric Telegraph Co.* (1862), 9 Cox C. C. 137 and 174.

The right given to the telephone company under its Acts to place poles along the sides of the highways and the municipality's right to direct their location are limited by the proviso that in erecting such poles the company shall not interfere with the public right of travelling on or using the highways.

A pole so placed must be regarded, therefore, as wholly unauthorized by law.

The evidence also shews that the pole standing where it did was the cause of the accident.

It was attempted to be shewn on the part of the defendants that the sleigh was overturned before it reached the pole owing to the swing of the vehicle in turning the angle at a high rate of speed, and on the part of the third parties that it was overturned before reaching the pole in consequence of deep ruts in the roadway on the west side

of the street between the end of the new pavement at the commencement of the turn in the street and the pole. But upon the whole evidence I think the true conclusion is that the sleigh, while still swinging or sluing, struck the pole and thereby the occupants were thrown out and the plaintiff Mary Louise Atkinson injured. There appears to be no doubt that the injury to the sleigh was occasioned by the collision with the pole. The presence of the pole on the very edge of a portion of the roadway ordinarily used for travelling upon with vehicles, and to the east or outside of a portion occasionally used by persons driving along the highway, led to the collision. Under the circumstances it was not possible for the driver of the sleigh to avoid the accident. The runaway was not caused by any fault of his, he seems to have managed the horses and controlled and guided their course as well as could be done, but it was not possible to prevent the swinging or sluing by which the sleigh was thrown out of its course. I think, therefore, the judgment in favour of the plaintiffs ought to be affirmed.

There remains to be considered the question between the defendants and the third parties. In regard to it the conclusions of the learned trial Judge may be summarized as follows: (1) The pole in question was planted by the Bell Telephone Company in 1893 in pursuance of an agreement between the defendants and the company and a by-law ratifying it dated 20th of February, 1893; (2) before planting the pole the company's lineman, wanting the authority and concurrence of the defendant corporation, went to one Stone, a member of the defendants' council, who sent him to one Reid, a member of the board of works, who sent him to one Delahanty, the defendants' street surveyor under a by-law appointing him to that position; (3) Delahanty pointed out to the company's employees the position of the pole in question and it was planted in the place indicated by him; (4) the agreement required the poles to be "erected under the supervision of the town engineer or other officer appointed for that purpose;" Delahanty was

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Moss,
J.A.

Judgment.

Moss,
J.A.

not the engineer, nor was he appointed for the purpose of supervising the erection of the poles, and no other officer was appointed for that purpose, but Delahanty was street surveyor, and the duties of that position seem to be as nearly related to the duty in question as any other offices in the corporation, if not more nearly; (5) the defendant corporation was aware of the location of the poles from 1893 until the time of the accident and never once made any objection; and (6) as between the defendants and the company the pole was put up under and sufficiently in accordance with the agreement under the superintendence of the corporation and with its sanction.

His decision on this branch of the case is thus stated: "Then if it be assumed that the pole was planted where it stood under the superintendence of the corporation and with its sanction I do not see how the corporation can recover indemnity from the company."

The learned trial Judge has found upon the conflict of testimony that Delahanty did, as a matter of fact, locate the position of the pole in question, and that it was placed where it was by his direction. There is evidence tending to the conclusion that some change may have been made, after Delahanty had concluded whatever he did and had gone away, in consequence of a difficulty about carrying the line from the pole in question across the street to the south side without interfering with some shade trees.

It is to be borne in mind that no holes were dug on the west side while Delahanty was present. Nothing more was done than to mark the spots by stakes.

And one of the points urged against the defendants is that they were made aware by Delahanty of his having located the poles on King street, and for this reliance has to be, and is, placed on Delahanty's evidence. His examination taken before the trial was put in by the plaintiffs. Among the questions and answers occurs the following: "When did you first learn that they had not followed out your instructions? The matter was discussed at the next meeting of the council in 1893. The mayor

asked how it was they were permitted to put their poles up there. I told the chairman of public works that they had not located poles where they had been instructed to; they had got too far out in the street."

Judgment.

Moss,
J.A.

This statement was not in strictness evidence against the company at the time it was put in. But Delahanty was called as a witness at the trial and in cross-examination counsel for the company, referring to an affidavit and depositions thereon made by the witness, asked: "So you told the board of works about the actual location of the poles within two weeks after the poles were located? Yes, that the poles were not put where I located them." This testimony, which was not sought to be displaced, supports the defendants' present contention that Delahanty did not authorize the erection of the pole in question in its present location.

But assuming that Delahanty did locate it, it is still necessary to see precisely what were his powers and authority and to what extent the defendants became and are bound by his acts.

Under section 3 of the company's Act of 1880, as amended in 1882, the location of the company's lines or line and the opening up of the streets for the erection of poles in cities, towns, and incorporated villages, are to be done under the direction and supervision of the engineer or such other officer as the council may appoint. Under the agreement between the company and the defendants the poles on King street were to be erected under the direction and supervision of the engineer or other officer appointed by the council for that purpose. As the learned trial Judge has found, Delahanty was neither the engineer nor a person appointed by the council for the purpose of supervising and directing the erection of poles either under the Acts or under the agreement. He had no authority from the defendants to undertake to perform such duties. The manner in which he was induced to assume them was not the result of corporate action and was wholly irregular.

According to the testimony of the company's witnesses

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J.A.

what occurred was this: One Buckley, the lineman in charge of the section including Chatham, was directed by the company to proceed with the erection of poles on King street under the agreement, and to apply to the company's local manager at Chatham, one Livesey, for instructions. He called upon Livesey and together they went to one Stone, a member of the defendants' council, who gave them the names of the members of the board of works, informed them that the chairman was absent from town and suggested their seeing one Reid, a member of the board. They saw Reid and explained that they would like the line laid out or pointed out on the street where they were to put the poles. Reid told them to go to Delahanty. They went to Delahanty and he accompanied them to a place on King street, near Lacroix street, and located a line of posts on the east side of King street from Lacroix street to the turn and on the south side from the turn to Third street.

The next morning Buckley and his men were proceeding with the work of digging holes for the poles on the east side, when Mr. Wilson, an owner of property on the east side, objected on the ground that the line would injure the shade trees. He and Buckley then went together to Delahanty and procured him to return and locate the line on the west side up to the turn, leaving it on the south side going east from the turn.

Now during all this time Delahanty had no communication with Reid or any member of the defendants' council, or with any officer of the corporation having any authority in the matter. Upon this evidence there was no direction by Reid to Delahanty or authority to him to act in the premises even if Reid's direction or authorization would suffice to bind the corporation.

Delahanty's account is that Livesey and Buckley came to him and told him that Reid had instructed them to come to him and he told them they had better see the chairman of the board of works. They came again and told him that Reid had instructed them to come to him.

Reid denied that he gave any direction to Delahanty through Livesey and Buckley or otherwise; and it is shewn that to Buckley he complained about the placing of the poles on the west side and wanted them restored to the east side and that Buckley declined to do so unless the defendants would bear the expense occasioned by the change.

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Moss,
J.A.

It also appears that objections were raised in the council to the poles having been placed on the west side but no further action was taken.

I am unable to discern in this any corporate authority to the company to place the poles where they were placed or any corporate act sanctioning Delahanty's action. Even if his act in locating the poles on the east side can be said to have been authorized through Reid there was no such authority for the change to the west side. That was done at the request of and to oblige Mr. Wilson and the company's employees were willing to accede to Mr. Wilson's request. But it was not sanctioned by the defendants' council or any member thereof, but on the contrary was objected to.

I do not think that in the circumstances the company has made out a case of corporate authority or sanction to the location of the poles where they were placed. And it is not to be assumed against the defendants that they assented to and authorized an act in itself illegal and improper and beyond the powers of the company to do and of the defendants to authorize.

Then, if wrongfully placed in the first instance, did anything occur to make the continuance of the poles there rightful as against the defendants?

The defendants base their claim against the company upon the provisions of sec. 609 of the Municipal Act, R. S. O. ch. 223, as well as upon the terms of the agreement of the 20th February, 1893.

The evidence shews that the pole was, in fact, placed in its position, and has, in fact, been maintained there by the company, and that it was an obstruction and that

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J.A.

the damages were sustained by reason of such obstruction. *Primâ facie* at all events the defendants have under the statute a remedy over against the company and are entitled to enforce payment of the damages and costs. Upon what grounds, if any, is the company entitled to be relieved from this *primâ facie* liability?

The learned trial Judge appears to have been of the opinion that the company could relieve itself by shewing that what was done was done with the knowledge and sanction of the defendant corporation.

The language of section 609 does not indicate any such restriction upon the right of the corporation to the remedy over. It does not speak of obstructions placed or maintained without the knowledge or sanction of the corporation. On the contrary, it appears to deal first with the case of obstructions, etc., placed or maintained without negligence or wrongful act or omission, and next with the case of negligent or wrongful acts or omissions on the part of the third party.

The language of the section read in its natural and ordinary sense seems to me to point to a remedy over in any case where the fact is established that the damages have been sustained by reason of an obstruction, etc., placed, etc., or maintained by another corporation or by any person other than a servant or agent of the municipal corporation.

Before the legislation the Courts of Ontario had determined that a municipal corporation which had been held liable in damages by a person injured through an obstruction placed upon one of its highways by a third person and allowed to remain there for sufficient time to affect the corporation with notice of its existence could not recover from the third person the damages and costs for which it had been rendered liable: *Vespra v. Cook* (1876), 26 C. P. 182. In that case Mr. Justice Gwynne pointed out that no case had been cited to establish the liability at common law of one who has committed one public nuisance to indemnify a person who has been guilty

of an independent public nuisance, namely, the continuance of the first in existence, from the consequences of such continuance, and observed that as a claim in the nature of indemnity the action was not maintainable unless under the provisions of a positive statute.

Judgment.

Moss,
J.A.

And this continued to be the law until in 1887 the Municipal Act was amended by 50 Vict. ch. 29, sec. 33 (O.), by adding to section 531 the following sub-section :

“(4) In case an action is brought against a municipal corporation to recover damages sustained by reason of any obstruction, excavation or opening in a public highway, street or bridge placed, made, left or maintained by any other corporation or by any person other than a servant or agent of the municipal corporation, such last mentioned corporation shall have a remedy over against such other corporation or person for and may enforce payment accordingly of the damages and costs, if any, which the plaintiff in such action may recover against the municipal corporation * * .”

Then followed provisions enabling such other corporation or person to be added as parties defendants or as third parties.

In 1891, by 54 Vict. ch. 42, sec. 24 (O.), the above sub-section was amended so as to cover the case of an obstruction, etc., “in or near to” a public highway, etc., and by making additional provisions as to bringing in the other corporation or person.

In 1892, by the Consolidated Municipal Act, another sub-section (7) was added to section 531, and finally, in 1897, by 60 Vict. ch. 45, sec. 18(O), sub-sec. (4) of sec. 531, was amended by inserting after the word “corporation” in the sixth line the words “or to recover damages sustained by reason of any negligent or wrongful act or omission of any other corporation or of any person other than a servant or agent of the municipal corporation.”

In the revision of the statutes in 1897, section 531 was divided into sections and the amended sub-section (4) is now sec. 609 of ch. 223. In every one of the amendments is to

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Moss,
J.A.

be seen an intention to extend the right of the municipal corporation to recover over against the person or corporation whose act or omission led to the injury, and the only express exception is where the act or omission was that of a servant or agent of the municipal corporation.

It is not necessary to determine whether such person or other corporation may or may not be able to excuse himself or itself on other grounds.

It is sufficient to say that in this case the company has not shewn itself entitled to be exonerated either under the agreement or the statute.

The pole in question was placed and maintained where it was by the servants of the company, and for its benefit and advantage, and in so placing and maintaining it the company did not comply with the terms of the agreement which required it to be placed under the direction and supervision of the engineer or other person appointed by the council for that purpose, and also that it should not interfere with the public right of travelling on or using the street.

And for the reasons I have indicated I do not think it has been established that the act of placing the post was the act of a servant or agent of the defendants acting in the performance of his duty as such servant or agent.

I think, therefore, that the defendants' appeal should be dismissed with costs as regards the plaintiffs, but that it should be allowed with costs as regards the Bell Telephone Company, and that judgment of indemnity should be entered in the defendants' favour with costs.

BURTON, C. J. O., and LISTER, J. A., concurred in the result.

*Appeal dismissed as against the plaintiffs,
and allowed as against the third parties.*

R. S. C.

EDMISON V. COUCH.

Trust—Grant on Condition—Release.

The owner of land, "in consideration of natural love and affection and of one dollar," conveyed it to the defendants in fee, subject to a life estate in his own favour, and "subject to the payment thereof by the (defendants)" of certain sums to the plaintiffs, the deed being voluntary as to them. The deed contained a covenant by the defendants with the grantor to make the payments and was executed by the grantor and the defendants. Seven months later the grantor conveyed the same land to the defendants in fee, for their own use absolutely, free from all encumbrances, but subject to his life estate :—

Held, that an irrevocable trust was created by the first deed in favour of the plaintiffs and was enforceable by them, and that this trust was not affected or released by the second deed.

Gregory v. Williams (1817), 3 Mer. 582, and *Mulholland v. Merriam* (1872), 19 Gr. 288, applied.

Judgment of ROSE, J., reversed.

APPEAL by the plaintiffs from the judgment of ROSE, J. Statement.

The plaintiffs were the grandchildren of one John Couch and brought the action to set aside, on the grounds of undue influence, duress, and want of mental capacity, his will, and several deeds made by him to the defendants, his two sons. They also claimed in the alternative that certain provisions in their favour in one of the deeds in question were not affected by a subsequent deed of the same land.

For the purposes of this report it is only necessary to refer to the provisions of these two deeds.

By the first, made on the 19th of June, 1894, in pursuance of the Act respecting Short Forms of Conveyances, John Couch, "in consideration of natural love and affection and the sum of one dollar," granted "in fee simple" to his two sons, the parties thereto of the second part, three hundred acres of land owned by him, "to have and to hold unto the said parties of the second part their heirs and assigns to and for their sole and only use forever, subject nevertheless to the reservations, limitations, provisoes and conditions expressed in the original grant thereof from the Crown, and subject also to the right of the said party of the first part to a life estate in the said lands and premises."

Statement. Then followed the usual statutory covenants by the grantor, and the statutory release clause, and then the following provisions:—"And which said lands and premises are conveyed also subject to the payment thereof by the said parties of the second part of the sum of five hundred dollars to each of the daughters of the said party of the first part, viz., Mary Jane Macdonald, wife of John Macdonald of the township of Percy in said county, wagonmaker, and Emmeline B. Couch, now of the township of Hamilton, spinster, the said payment to Mary Jane Macdonald to be made at the expiration of two years from the death of the said party of the first part, and the said payment to Emmeline B. Couch to be made at the expiration of three years from the death of the said party of the first part, and subject also to the payment to William Charlton Edmison and Hilda Edmison, grandchildren of the said party of the first part, of the sum of two hundred and fifty dollars each as soon as they shall have attained the age of twenty-one years. And the said parties of the second part hereby covenant, promise and agree to and with the said party of the first part, his executors, administrators and assigns, that they the said parties of the second part will pay each of the said daughters of the said party of the first part the sum of five hundred dollars at the times hereinbefore stated and that they will further pay to each of the said grandchildren of the said party of the first part the sum of two hundred and fifty dollars as soon as they shall have respectively reached the age of twenty-one years."

By the second deed, made on the 19th of January, 1895, in pursuance of the Act respecting Short Forms of Conveyances, John Couch, "in consideration of natural love and affection and the sum of one dollar," granted to his two sons, the parties thereto of the second part, "their heirs and assigns forever," the same lands, "to have and to hold unto the said parties of the second part their heirs and assigns to and for their sole and only use forever, subject nevertheless to the reservations, limitations, provi-

soes and conditions expressed in the original grant thereof from the Crown, and subject also to the right of the said party of the first part to a life estate in the said lands and premises." Then followed the statutory covenants by the grantor, that as to quiet possession being qualified by the words "except as herein specified," and the grantor released all his claims "except as hereinbefore specified." Statement.

Both deeds were executed by the grantor and the grantees. The plaintiffs, and the daughters of the grantor, did not know of the deeds till after the grantor's death.

When the action was brought the plaintiffs, who sued by their next friend, had not attained the age of twenty-one years.

Mary Jane Macdonald and Emmeline B. Couch, daughters of the grantor John Couch, were defendants in the action and submitted their rights to the Court.

The action was tried at Cobourg on the 31st of May, 1898, before ROSE, J., who, on the 9th of August, 1899, gave judgment in the defendants' favour, holding, on the evidence, that a case of undue influence, duress, or want of mental capacity, was not made out, and, following an unreported case of *Birch v. Birch*, that the second deed put an end to the rights given by the first deed.

The learned Judge expressed the view also that the deed of the 19th of June, 1894, had not been delivered by the grantor, though he did not put his judgment on that ground.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 23rd of May, 1899.

E. C. S. Huycke, for the appellants.

F. M. Field, for the defendants in the same interest.

W. R. Riddell, and *A. J. Armstrong*, for the respondents.

Upon the argument the questions of undue influence,

Argument. duress, want of mental capacity, and delivery of the deed, were much discussed. As to the effect of the deed of 1894, the following cases were referred to: *Re McMillan* (1889), 17 O. R. 344; *Mitchell v. City of London Assurance Co.* (1888), 15 A. R. 262; *In re Empress Engineering Co.* (1880), 16 Ch. D. 125; *Gandy v. Gandy* (1885), 30 Ch. D. 57; *New's Trustees v. Hunting*, [1897] 2 Q. B. 19, at p. 30; *Toker v. Toker* (1863), 3 DeG. J. & S. 487; 31 Beav. 629; *In re Way's Settlement* (1864), 10 Jur. N. S. 1166; *Mulholland v. Merriam* (1872), 19 Gr. 288; (1873), 20 Gr. 152; *Henderson v. Killey* (1889), 17 A. R. 456; *Faulkner v. Faulkner* (1893), 23 O. R. 252.

November 14th, 1899. MACLENNAN, J.A. :—

I agree with the learned Judge that the plaintiffs have not successfully impeached the deed of the 19th of January, 1895, on any of the grounds set up in the statement of claim, or on the evidence. I think it is abundantly proved that the grantor knew what he was doing and acted with deliberation in making that deed, as well as the will and codicil, and the other deeds which are referred to. The question remains whether the judgment is right in deciding that the deed of 1895 destroyed the charge upon the 300 acres, to which that land was made subject in favour of the plaintiffs, by the deed of the 19th of June, 1894.

Both deeds were executed both by the grantor and the grantees, and the later deed makes no reference in terms to the first. My learned brother held that there was no sufficient evidence of the delivery of the first deed, and that the grantor retained it in his possession, so that he might change it if he thought fit. I am constrained to differ from my learned brother's conclusion on this point. I think the evidence of delivery is ample, and there is no significance in the retention of the deed by the grantor, for he was the proper custodian of it, by reason of the life estate which he had reserved.

My learned brother has also held that by the effect of

the second deed the charge in favour of the plaintiffs contained in the first deed was annulled or revoked. He so decided in reliance upon an unreported decision of the learned Chancellor, of *Birch v. Birch*, which was afterwards affirmed by a Divisional Court. In that case there had been a conveyance of land by a father to his son, which was voluntary, save so far as it was made otherwise by a contemporaneous bond given by the son to the father, under a penalty of \$5,000, reciting that the deed was given on condition that the son should pay the grantor and his wife an annuity of \$150, for their respective lives, with other services, and also certain other sums to other persons. Nine years afterwards the grantor executed to the grantee a quit claim deed releasing the land and the grantee from the payment of money charged upon them by the bond.

Judgment.
MACLENNAN,
J.A.

The judgment was that the deed was effectual for that purpose, and an action by one of the beneficiaries under the bond, other than the obligee, was dismissed. It is not necessary for us to determine whether that case was, or was not, well decided. Something might depend on the language of the several instruments. So far as the facts have been disclosed to us, I incline to think it was not well decided; but whether it was or not, it is not binding on us, and I confess I think it clear that my learned brother's decision in the present case cannot be upheld.

It is said that this is a voluntary deed, but that is not so. As between the grantor and grantees it is a deed for value. The charges in favour of the daughters and grandchildren, which the grantees were to pay, and which they covenanted to pay, were a valuable and very substantial consideration for the conveyance. It is clear, therefore, that the grantor could not have revoked this deed, and have conveyed the land to other persons. Nevertheless, as between the grantor and the chargees, the daughters and grandchildren, the deed was certainly voluntary; and the contention is that the grantor retained absolute control over those charges, and could direct them to be paid to himself instead of the beneficiaries named, or to other

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MACLENNAN,
J.A.

persons, or could, as it is contended he did, release them to the defendants. I cannot agree to that contention. The second deed, as I have already said, makes no reference to the first, nor to the charges therein provided for, but is a mere grant of the land in fee, as before reserving a life estate, but free from encumbrances. No doubt that deed would, and did, put an end to every beneficial interest, if any, which the grantor still had therein, but it could not affect the interest of other persons. It did not in terms release the covenant for payment, and unless that can be held to have been released on some equitable ground, it is still binding on the defendants. The second deed would have the effect of relieving the land, if the charges were still under the control of the grantor, but unless they were, his deed could not affect them, and even the covenant would still be available in equity to the chargees inasmuch as the grantor would be regarded as a trustee of the covenant. The important question, therefore, is whether the deed of 1894 created a trust for the benefit of the daughters and grandchildren of the grantor, which they could themselves respectively enforce, and I am of opinion that it did.

I think the case is governed by *Gregory v. Williams* (1817), 3 Mer. 582, and *Mulholland v. Merriam* (1872), 19 Gr. 288. The first of these cases has been recognized as good law by the Court of Appeal in England, and the other by this Court. I think this a plainer case than *Mulholland v. Merriam*. The conveyance in that case was on condition that the grantee should pay, and then the grantee bound himself, that is, in effect, covenanted, to pay certain sums to the children and grandchildren of the grantor. There was no express charging of the land with the payments. Here on the other hand the land is conveyed subject to the payments, and in respect of the payments to the daughters they are expressly to be paid thereout, that is, out of the land. Now, as I understand those cases, the distinction is this: a mere covenant by A. with B. to pay a sum of money to C. gives C. no right of action at law or in equity to

enforce the covenant, but if the payment is to be out of specific property, then a trust arises in favour of the beneficiary which he can enforce against the property. The effect of the deed in question was that the defendants became and were the owners of the land subject to the charges, and the deed also gave the charges to the respective parties as effectually as it was possible in law to give a chose in action. It is a case of property charged in the hands of the owner with sums of money to be paid to certain persons. The owner has expressly assented to the charge by executing the deed which created it, and he holds the land subject to it, and, to the extent of the charge, he holds the title as trustee. That being so there is in my opinion a clear trust in favour of the chargees, which they can enforce in their own names, in a Court of Equity. The deed has in effect given them an equitable interest in the land.

Judgment.
MACLENNAN,
J.A.

I had occasion to consider the general question in *Henderson v. Killey* (1889), 17 A. R. 456, where the following English cases are cited: *In re Empress Engineering Co.* (1880), 16 Ch. D. 125, and *In re Rotherham Alum Co.* (1883), 25 Ch. D. 103.

But it was also contended that in any case the charge was revocable. I think it clearly was not. It was a complete executed trust, nothing remained to be done; and the rule is that in such a case there can be no revocation unless the power to do so has been reserved: *Ellison v. Ellison*, and cases cited, 2 W. & T. L. C., 7th ed., p. 863. An apparent exception from the rule is an assignment for the payment of creditors. But that exception rests on special grounds, and even in that case, if the debts are to be paid after the settlor's death the deed is irrevocable: *ib.*, 887-8.

Here the payments to the daughters were to be made after the testator's death, and no doubt that was the expectation with respect to the payments to the grandchildren, having regard to their ages, and that of the settlor.

There being, as I hold, a trust in favour of the chargees

Judgment. created by the deed, the covenant taken by the grantor
MACLENNAN, would be regarded as also a trust for their benefit, which
J.A. in equity he could not release, and which can still be
enforced, if necessary, by the grantor's personal representative.

The result is that the appeal should be allowed, and there should be judgment for the plaintiffs declaring their respective claims to be a charge upon the 300 acres, and to be paid when the plaintiffs respectively attain the age of twenty-one years.

Moss, J.A.:—

I agree in the result.

I only wish to add, with regard to the case of *Birch v. Birch*, that I think it was well decided upon its own circumstances. The sole consideration for the first instrument was the bond given by the grantee to the grantor and this the grantor held in his own hands.

There was abundant evidence shewing a new and substituted consideration and an agreement to that effect deliberately entered into, and there was in the subsequent deed an actual release of the covenants and agreements contained in the first bond, all circumstances which do not occur here.

BURTON, C.J.O., OSLER, and LISTER, JJ.A., concurred.

Appeal allowed in part.

R. S. C.

GRAYSTOCK V. BARNHART.

*Evidence—Deed—Alteration—Proof of Execution—Registry Act—
R. S. O. ch. 136, sec. 63.*

The production of the registered duplicate original of an instrument with the registrar's certificate endorsed thereon is, by virtue of sec. 63 of the Registry Act, R. S. O. ch. 136, *prima facie* evidence of the due execution thereof, notwithstanding the fact that material alterations appear on the face of the instrument, all questions as to these alterations being however still left open.

Whenever it would be an offence to alter a deed which has been completed, the legal presumption is that material alterations appearing on the face of the deed were made at such a time and under such circumstances as not to constitute an offence.

APPEAL by the plaintiff from the judgment of BOYD, C., Statement.
at the trial.

The action was brought to foreclose a mortgage, dated the 17th of August, 1891, purporting to be made by Norman Barnhart, since deceased, to the plaintiff, his wife, the defendant, being a party thereto for the purpose of barring her dower. The defendant was the devisee of the equity of redemption under the will of the mortgagor, and also his sole executrix.

The defence was that the mortgage was altered after its execution by substituting the name of the plaintiff as mortgagee therein, instead of that of one John Burnham, to whom the plaintiff paid it in full after her husband's death; and in the alternative that if the plaintiff and not Burnham was the real mortgagee, Burnham was his solicitor and agent authorized to receive payment thereof for him.

The action was tried at Peterborough on the 29th of November, 1898, and was dismissed, and the appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., on the 26th of September, 1899.

*Watson, Q. C., and R. M. Dennistoun, for the appellant.
Shepley, Q. C., and G. M. Roger, for the respondent.*

Judgment. November 14th, 1899. BURTON, C. J. O.:—

BURTON,
C.J.O.

The plaintiff relied on the production of the original mortgage with the registrar's certificate of registration indorsed upon it, which by the Registration Act is made *primâ facie* evidence of the registration and of the due execution of the document registered.

The learned Judge declined to receive that as proof, holding that the Act does not apply if the instrument contains a material alteration ; adding that though the registrar had been pleased to register this document, he might very well have refused, but that the registration did not improve the character of the deed.

In this I think with great deference that the learned Judge was mistaken. The registrar would have mistaken his duty if he had refused to receive a deed for registration simply because it contained an alteration, and would have been liable to an action and to make good to the plaintiff any damages which he might sustain by reason of his refusal to register. I think the learned Judge overlooked at the moment that although the rule was at one time as he ruled, that has been changed, and the rule now is that alterations and interlineations in a deed are presumed to have been made before execution.

In the case of a deed over thirty years old some account is required to be given of its custody, or that possession has accompanied it, but although it was at one time held that if there were any erasure or interlineation in it, the witness should be called, or his signature proved if dead, that is not now the law, and the onus is upon the party objecting to the deed to prove that it was made since the execution.

This rule is adopted in the case of deeds because a deed cannot be altered after execution without fraud or wrong, and fraud or wrong is never assumed without some proof, and the law presumes *primâ facie* that any alteration apparent on it was made at such a time and under such circumstances as not to constitute an offence.

Even in the case of bills of exchange, where the law presumes nothing but leaves the jury to decide, first by inspection of the bill whether any alteration has been made, and then, on considering the extrinsic evidence, at what time and under what circumstances such alteration was made, these questions cannot be solved by the jury on the mere inspection of the writing, for, as has been well said, juries must decide not on conjecture but on proof.

Here the plaintiff was no party to the alteration, and it was in its present shape when first handed to him. Burnham, who made the alteration, was guilty of very numerous frauds in receiving moneys due on his clients' securities and never paying them over, and it is to be feared that the knowledge of these rascalities having been committed rather led the learned Judge to a somewhat hasty conclusion in dealing with this question of evidence. He refers to it as being used as an instrument of fraud. I find it difficult to ascertain how Burnham was to profit by the alteration; if the instrument had been changed from the plaintiff's name to his own I could understand that it might have been done for the purpose of enabling him afterwards to receive the money, as he afterwards did, without being guilty of any legal wrong.

I think the learned Judge was also in error when he ruled that all the living witnesses should have been called to clear the matter up, whereas upon the authorities I have referred to the onus was upon the other side to displace the *prima facie* case made by the production of the registrar's certificate.

Mr. Shepley referred to *Clark v. Stevenson* (1864), 23 U. C. R. 525; (1865), 24 U. C. R. 200, in support of this contention, but it does not apply. That was the case of admitting secondary evidence, and the well-known rule applied that the party relying upon it was bound to exhaust every source of direct evidence within his power, and was bound, therefore, to call the defendant though adverse in interest.

In deference, however, to the opinion expressed by the learned Judge, counsel called Miss Davidson, the other

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subscribing witness, who proved that the document was signed by both Barnhart and his wife, but she was unable to say whether the alteration was in it when signed.

But it is said, and truly said, that it was competent to the trial Judge, if the evidence warranted it, to find upon the whole facts that the mortgage was altered after its execution, but for the reasons I have given I do not think any such question arose at the trial, but the judgment was given upon the learned Judge's view of the Act not applying to deeds in which a material alteration appeared.

There is a further question that has not been tried, viz., whether the payment was made by the defendant to Burnham as her own solicitor, or as agent of the plaintiffs. On the other point there are circumstances which no doubt raise very grave suspicions as to the time when the alteration was made. Whether these circumstances are sufficient in themselves to rebut the presumption of due execution furnished by the registrar's certificate is a matter which, with the production of further evidence not produced at the last trial, such as the date of the advance by the mortgagee of the mortgage money, the necessity of calling in Miss Davidson as a witness to the deed, (if the alteration had been made at that time Burnham himself might have been the witness), and the long delay in the registering of the document. All these are matters to be considered in dealing with the question of whether the *prima facie* proof of due execution has been displaced, and on the whole we think the matters in issue are sufficiently involved in doubt to render it desirable to submit the whole case for further investigation upon such further evidence as the parties may be advised to produce in answer to the *prima facie* evidence of due execution furnished by the registrar's certificate, and upon payment of costs.

OSLER, J. A. :—

The only question is whether, upon the evidence, the alteration in the instrument ought to have been held to

have been made after its execution by the mortgagor and the defendant. Judgment.

To prove the execution the plaintiff put in the duplicate original of the mortgage produced from the custody of the defendant. The registrar's certificate of registration was endorsed thereon, and also the words "paid and discharged September 12th, 1893, John Burnham." He also put in a copy certified by the registrar of the other duplicate in the registrar's custody. The factum of the execution was also proved by the surviving subscribing witness at a later stage of the case. All the written parts of both duplicates as originally prepared were in the handwriting of a clerk of the late John Burnham, a solicitor in Peterborough, who was then named therein as the mortgagee. His name and description now appear therein struck through with a pen and the plaintiff's name is written below, thus: "Mark Graystock of the township of Otonabee, in the county of Peterborough, farmer (hereinafter called the mortgagee), of the third part." These substituted words were in the handwriting of Burnham.

The learned trial Judge ruled that the mode of proof provided by the Registry Act only applied where the instrument bore authenticity on its face, but not where there was a palpable alteration. Then the plaintiff called Miss Davidson, the clerk who had prepared the mortgages and who was the first subscribing witness. She testified that her instructions were from Burnham to prepare the mortgage to himself, that on a subsequent day she was called in by Burnham to witness its execution by the defendant and her husband, that she did witness it and subscribed her name as the attesting witness, that Burnham was present, but did not sign his name as a witness while she was there. She did not hear this mortgage read over, and as it was lying open she did not know whether any alteration had then been made in it. Burnham afterwards, October 16th, 1891, made the affidavit of execution before the registrar for the purpose of registration.

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J.A.

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OSLER,
J.A.

The Chancellor was of opinion that when Miss Davidson signed as witness, Burnham was the mortgagee, and therefore that there had been an alteration after the execution of the mortgage. The action was accordingly dismissed.

The question whether there was sufficient proof of the mortgage under section 63 of the Registry Act is of small importance because the factum of the execution was proved by one of the subscribing witnesses. The section of the Act may, however, be referred to and the case noted which was decided thereon in its present form many years ago, which has always been followed.

“In case an instrument in two or more original parts is registered, the registrar shall endorse upon each of such original parts a certificate of the registration in the form of Schedule J to this Act, and any original so certified shall be received as *prima facie* evidence of the registration and of the due execution of the same.”

On this was decided, in 1879, the case of *Canada Permanent Loan and Savings Co. v. Page*, 30 C. P. 1—in effect in the terms of the section—that the production of the registered duplicate original of a mortgage with the registrar’s certificate endorsed thereon is *prima facie* evidence of the due execution of such instrument.

Evidence of the factum of the execution, that is to say, of the signatures of the parties to the instrument, and of its delivery is *prima facie* evidence of its due execution. That leaves open all other questions which arise upon it as to alterations or otherwise, and that is all that the statute contemplates. Proof having once been made by the oath of a subscribing witness, and acted upon by the registration of the instrument, it was deemed reasonable that the instrument should be taken as *prima facie* proved under other circumstances and for other purposes.

Proof by production of the registered and certified original duplicate is equivalent to proof to the extent above mentioned by the subscribing witness, and no further, and each mode of proof may be given in similar circumstances and with the like effect whether alterations appear

on the face of the instrument or not. The case may, therefore, be taken as if the proof of execution and delivery rested upon the evidence of the subscribing witness alone. Then what effect is to be attributed to the alteration? Was the plaintiff bound to go further and prove that it was made before the execution? The rule cannot be more concisely stated than it is in the head-note of the case *Doe d. Tatum v. Catomore* (1851), 16 Q. B. 745: "As a deed cannot be altered after execution without fraud or wrong the presumption, if an alteration appears, is that it was made before execution. But this presumption does not apply in the case of a will which may be altered by the testator without fraud or wrong." See also *Doe d. Shallcross v. Palmer* (1851), 16 Q. B. 747, and *Simmons v. Rudall* (1851), 1 Sim. N. S. 115, 137.

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OSLER,
J.A.

In the 9th ed. of Taylor on Evidence (1897), p. 1192, sec. 1819, it is said: "It may be laid down as a general rule that wherever it is an offence to alter a document after it has been completed, the law presumes, *primâ facie*, that any alteration apparent on it was made at such a time and under such circumstances as not to constitute an offence. With respect, however, to a bill of exchange, the law presumes nothing."

Subject to the modification recently introduced by the Bills of Exchange Act in reference to an alteration which is not "apparent:" *Scholfield v. Londesborough*, [1896] A. C. 514, it lies upon the holder to shew that it was made under such circumstances as not to vitiate the bill: Byles on Bills, 15th ed., p. 339, where the reasons for the distinction are forcibly stated; *Master v. Miller*, 1 Sm. L. C., 10th ed., p. 784; Powell on Evidence (1898), p. 75. The whole subject appears to be learnedly dealt with in the 2nd ed. of the Am. & Eng. Ency. of Law, vol. 2, pp. 181-283.

In the case, therefore, of a deed of which the due execution has been proved, the onus is upon the party who attacks it to shew that the alteration was made after its execution.

The next question is whether the evidence was sufficient to warrant that inference in the present case.

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OSLER,
J.A.

The appearance of the instrument may serve to give weight to the extrinsic evidence as to the time at which the alteration was made, but the question cannot be solved from its mere inspection alone. Judges as well as juries must decide not on conjecture but on proof, as is somewhat tritely observed in the section above quoted from Taylor on Evidence.

The witness Davidson, who was in Burnham's office during the month of August, 1891, prepared the mortgage from written instructions given by him at the time, in which he was specified as mortgagee and trustee. Whether it was executed on the day on which it was made out—and the date is filled in by the clerk—is rather uncertain, but it must have been very shortly after and certainly sometime during the month of August. At that time it is clear that Burnham had no money of the plaintiff's in his hands for investment. According to the plaintiff's evidence his habit was not to cheque out his money until an investment had been offered to him, and he had approved of it. As he says, "before I gave him the money I always knowed where it was going." Elsewhere, he says that he thinks he got the mortgage somewhere about the 14th September, and that he gave Burnham the money about that time. This would agree with the pencil memorandum made by Burnham on the mortgage: "Mr. Graystock receives interest from 14th September, 1891," and with an entry in the plaintiff's private memorandum book of that as the date of his investment. From other parts of his evidence, however, it might be inferred that he did not pay out his money until after the 16th of October, the date of registration of the mortgage. It is a significant fact that while the plaintiff was not to receive interest from a period earlier than the 14th of September, the mortgagor was charged and he paid the first half-year's interest in full from the date of the mortgage, which accords with the loan having been made by Burnham as originally contemplated in his character of trustee out of any moneys he may then have had in his hands. The circumstances attending the attes-

tation are also to be regarded. Why upon the hypothesis of the alteration having been already made should Burnham have needlessly become a subscribing witness, or why, having called in the clerk as a witness and not himself attesting it at the same time as she did, should he not have had the alterations initialled by her instead of doing so himself alone?

Upon the whole it appears to me that the weight of the evidence is that while the instrument was certainly executed in August the plaintiff did not come into the transaction earlier than September, *i.e.*, that his name was not contemplated as that of the lender when the mortgage was executed. I cannot say, therefore, that the learned trial Judge was wrong in holding as he did upon the whole of the evidence, that the alteration took place after the execution.

I favour, however, the granting of a new trial in order that a fuller enquiry may be made as to the date at which the money was paid over by the plaintiff to Burnham, and the actual date of making the advances to the mortgagor. The state of the plaintiff's account at his bank may throw further light on the matter, and it would have been satisfactory to have had the defendant's own evidence as to when the money was received by her husband. For all that appears she may be able to throw some light upon this.

I have not thought it necessary to make any allusion to Burnham's dealings or misdealings with his clients' funds, or any suggestions as to why the fraud, if fraud there were, should have been perpetrated. It may indeed be, assuming that Burnham did not for himself or some other client advance the money at the time the mortgage was executed, that however wrongful the alteration, it was made, one cannot say thoughtlessly, yet without any intention of committing a deliberate fraud, and for the purpose of inserting the name of the real lender after it was found that the plaintiff would advance the money. This, of course, would not better the plaintiff's case, if, as I have

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said, and as I think the evidence warranted the trial Judge in finding, the plaintiff did not come into the transaction until the middle of September or later. There may, therefore, if the plaintiff desires it, be a new trial on payment of the costs of the last trial and of this appeal.

MACLENNAN, MOSS, and LISTER, JJ.A., concurred with OSLER, J.A.

New trial granted on payment of costs.

R. S. C.

IN RE ROBERTSON AND CITY OF CHATHAM.

Municipal Corporations—Local Improvements—Mode of Assessment—Appeal—County Court Judge—Prohibition.

When a sewer is being constructed by a municipal corporation under the local improvement system and land not fronting on the street in question is benefited as well as land fronting thereon, the proper method of assessment is to determine what proportion of the cost the land fronting on the street shall bear, and what proportion the land not so fronting shall bear, and to assess the proportion payable by each class according to the total frontage of that class, and not according to the benefit received by the lots in that class *inter se*.

Semble: Such an improvement and the assessment therefor must be carried out under the provisions of a special by-law, not under a general by-law passed pursuant to section 667.

Judgment of a Divisional Court, 30 O. R. 158, affirmed, BURTON, C.J.O., and LISTER, J.A., dissenting.

But held also, reversing that judgment, OSLER, and MOSS, JJ.A., dissenting, that after the County Court Judge had, on appeal by an owner, given his decision, on a day subsequent to the argument, it was too late to obtain an order for prohibition against him.

Statement.

APPEAL by A. K. Robertson from the judgment of a Divisional Court, reported 30 O. R. 158.

The appellant was the owner of certain lands in the city of Chatham, which were assessed, under the local improvement system, for part of the cost of a sewer. On appeal by Robertson to the County Judge the assessment was very much reduced, and the present proceedings were then taken by the city and an order for prohibition obtained. The facts are stated in the report below.

The appeal was argued before BURTON, C.J.O., OSLER, Argument.
MACLENNAN, MOSS, and LISTER, JJ.A., on the 18th and
19th of May, 1899.

J. T. Small, for the appellant. The motion for prohibition was too late. The County Judge had given his decision and was *functus*. Nothing remained to be done by him and the order was useless. The motion should, therefore, have been dismissed. On the merits his decision was right. Under the municipal legislation as it now stands the imposition of an arbitrary frontage rate is no longer the proper mode of working out a local improvement assessment. At one time that mode had to be adopted, but now each parcel should be assessed for the proportion of the total cost properly payable by it, having regard to the extent of benefit derived, and that proportion should then be charged against the parcel as a frontage tax: *In re Larkworthy* (1895), 31 C. L. J. 604. The ground upon which the respondents moved for prohibition was that under the proviso to section 671 (6), the County Judge could not interfere with the "quantum" of assessment. The effect of such a construction would be the remarkable one of allowing an appeal to the Court of Revision under section 671 (5), but not an appeal from the Court of Revision to the County Judge, which could hardly have been intended. The language used in the proviso to sub-section 671 (6) originally [see 59 Vict. ch. 51, sec. 28 (2)] was that the County Judge should not interfere with or alter the "assessment," but by 60 Vict. ch. 15, schedule "C" 121, the word "assessment" was altered to the word "statement," the intention of the Legislature evidently being that while the County Judge might alter the rate or scale of assessment he was not to exclude any land from the "statement" [defined in section 671 (4)] unless he found among other things that the property in respect of which an appeal was brought before him could not from its situation be benefited at all by such work or improvement. The language in several parts of

Argument. the Act shews that there is not to be an arbitrary equal frontage rate over every foot of a whole street or locality, *e.g.*, section 664 (1). Any other view would involve great hardship and injustice and would leave persons assessed practically without any right of appeal beyond the Court of Revision. That when the Act speaks of properties benefited it means the special benefit to any particular property is clear from section 673 (6). If the hard and fast policy of the Act were to assess each foot fronting on the street equally, then there would be no reason for such a provision as that referred to in the section just cited, and the fact that the word "equal" has been dropped in the present Act is, in view of the other provisions of the Act, of great weight.

Aylesworth, Q.C., and *Douglas*, Q.C., for the respondents. No order had been made by the County Judge when this motion was launched and it was in time. He had not even definitely decided the question argued before him but had merely expressed his intention of altering the assessment and was really acquiescing in an appeal being taken by way of prohibition. Having found that the appellant's land was to some extent benefited, the County Judge had no jurisdiction to alter the quantum of assessment. He can decide only the question of benefit or no benefit and must strike off the assessment wholly or leave it alone. The scheme of assessment under the local improvement clauses is by way of equal frontage rate. The city council has power, in certain cases, to deal with the question of quantum of benefit, but no other tribunal can interfere. Section 671 (5) does not support the appellant's contention. It gives, it is true, the same right of appeal as is given by the Drainage Act, but this must mean a right of appeal of the character referred to in the other local improvement clauses. Section 671 (6) defines the limits of the County Judge's jurisdiction. The presence in the statute of the special exceptions referred to in sections 665 (3), 673 (4), (6), and (7), and 674 (2) and (3), emphasizes the general governing principle of equal frontage rate.

Small, in reply.

November 14th, 1899. BURTON, C.J.O. :—

Judgment.

BURTON,
C.J.O.

This matter came originally before Mr. Justice Meredith, on a motion for a writ of prohibition to the County Court Judge of the county of Kent, on the ground that he had no jurisdiction, there being, as was contended, no appeal given under the clauses of the Municipal Act respecting local improvements of this nature, and the learned Judge so held, and this decision was affirmed by the Divisional Court, in which a very exhaustive and elaborate judgment was delivered by the learned Chief Justice, Sir William Meredith. I fully concur in the opinion expressed by that learned Judge, that the provisions dealing with these matters are most complicated, cumbrous and contradictory, and I would add as applied to sidewalks, illogical, and not unfrequently very unjust. I have in my mind at this moment cases in which many hundred yards are assessed against the adjoining property and used by the public generally, where almost the only use of it made by the proprietor is in crossing it on his way from his residence into town.

The learned Judge has in the course of his judgment pointed out how the mode of assessment has from time to time varied; in some cases an equal frontage rate pure and simple being provided, in others an assessment according to benefit on the value of the property without the improvements, in others on such value including the improvements, varying, in fact, at almost every meeting of the Legislature as the learned Judge has pointed out. I do not propose to attempt to reconcile these and the present provisions, nor to found any argument from them as to the meaning of the Legislature in the present enactment, but as the system of charging an equal rate per foot frontage, irrespective of value or benefit, is so manifestly unjust, to enquire whether the present Act may not have been passed with the view of remedying such an injustice in a case like the present.

Generally speaking in the case of city or town lots

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C.J.O.

abutting on a particular street, they are usually of the same size and depth, and not varying much in value and therefore the equal foot frontage does not appear an inequitable mode of making a division of the cost of the work, there being provision made where a lot is unfit for building purposes to reduce the rate.

In the present case the appellant's property consists of a farm of 200 acres recently brought within the city limits but still used entirely for agricultural purposes, and rented as a farm for a term of years, so that it cannot be used for building purposes, and to assess it in the same way as small building lots, certainly seems very unreasonable and one not to be adopted unless the language of the statute will bear no other interpretation.

I cannot help thinking that it was not intended by the present Act to charge the abutting property upon the simple rule of equal frontage without determining whether such property was specially benefited by the work or improvements and to what extent, and I base my judgment partly on the fact that in the present Act the word "equal" has been dropped, and on the additional fact that a mode is provided for ascertaining and determining what real property will be immediately benefited by the work, and for ascertaining and determining the proportions in which the assessment of the cost thereof is to be made on the various portions of real estate so benefited.

The Act then proceeds to give an appeal from any such assessment or proposed scale of assessment to the Court of Revision, and from the Court of Revision to the County Judge, as is provided for by the Municipal Drainage Act, and the proceedings thereon shall, except as is otherwise provided by the Act, be the same as in the case of appeal from ordinary assessments under the Assessment Act.

When we refer to section 671 we find that the council is to procure a measurement to be made of the frontages liable to assessment, and to post up a statement shewing the lands liable to assessment and publish a notice that a Court of Revision will be held for the purpose of

hearing complaints against the proposed assessment or the accuracy of the frontage measurements or any other complaint which is by law cognizable by the Court.

That statement, as I understand the scheme, is intended to be made final and conclusive except where there has been an incorrect measurement or in the several instances pointed out in the proviso under sub-sections (b), (c), (d) and (e), but I do not understand that the Judge is restricted from interfering with the assessment so far as he finds the assessment for benefit is too high, and there is nothing so far to lead necessarily to the conclusion that the frontage assessment is to be an equal one.

I cannot at all understand the object of ascertaining the extent of benefit each property is gaining by the work if after all an equal rate is to be imposed. I think that it was the duty of the engineer or other person employed to fix the amount each property should be assessed for benefit, and then impose that sum, the law then providing that it shall be assessed and levied annually at so much per foot on the frontage, but if the party assessed complains of the benefit being estimated at too high a figure, there is the same power to reduce the assessment as in an ordinary case. I think the determination arrived at in the statement is intended to be made final and conclusive except in those cases to which I have referred, but I think the Court of Revision and the County Judge have still the power to review the amount of benefit derived from the improvement, and to make that the limit of the sum to be fixed as the frontage rate.

If this is not so it is difficult to understand the object of enquiring into the question of benefit at all. The cost of the work is ascertained, and if benefit has nothing to do with it, all that was required was to divide it between the lots according to the total number of feet.

As I understand the assessment in this case the learned County Court Judge found that a very large portion of the land assessed was not and could not be benefited by the work, and that is a matter which he was authorized to enquire into.

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C.J.O.

Judgment.

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C.J.O.

I do not see how sub-section 6 of section 673 aids us in any way in deciding whether the frontage rate is to be equal or not, and it is difficult perhaps to understand why that particular ground for reduction should not have been left to the Court of Revision as well as other grounds, except, perhaps, that where it was so obvious that the property would not derive an equal benefit the council itself should so assess at a lower rate originally instead of putting the owner to the expense of an appeal. It does not aid materially in arriving at a conclusion one way or the other, but is rather, in my opinion, in favour of the rate being controlled by the actual benefit, and not being an arbitrary equal rate.

To summarize what I have said : It must, I think, be conceded, that if section 664 (1) stood alone there could be but little doubt that each separate parcel of property would have been the subject of enquiry and report by the engineer as to benefit, as between themselves, and also as to the proportions in which the various portions of the properties benefited should be assessed for the cost of the scheme. If this be so, I do not see how that mode of taxation can be altered or repealed except by express enactment, and I think none of the clauses referred to have that effect. The course to be pursued is clearly pointed out in that sub-section and in the by-law, and the ascertaining and determining the benefit and the proportions are as important as any other. But why go to the trouble of ascertaining the benefit if after all it is not to be an element in making the assessment, but an equal rate is to be imposed without reference to value or benefit ?

To my mind the Legislature intended to remedy what had been found to be a very inequitable and unjust mode of assessment. Whether they have succeeded in doing so may be doubtful, looking at the difference of opinion which exists, but I think that was the main object of the enactment, and sub-section (1) may, I think, well stand with the other provisions, some of which have obviously no bearing on a case like the present.

I think also that the motion for prohibition was too late, and that on both grounds the appeal should be allowed.

Judgment.

BURTON,
C.J.O.

OSLER, J.A. :—

After a careful study of the local improvement sections of the Municipal Act, I am forced to the conclusion that the County Judge had no jurisdiction to entertain an appeal in respect of the quantum of the special frontage rate imposed upon the appellant's property for the cost of the sewer constructed on the street in front thereof under the provisions of the respondents' general local improvement by-law, and that prohibition was properly granted.

These clauses are in many respects so inconsistent with each other as to make their construction a matter of much difficulty. This was perhaps to be expected from the annual process of amending, and reamending, which the whole group has undergone, and which has been to a great extent traced in the, if I may be permitted to say so, able judgment of the learned Chief Justice in the Court below. With that judgment I in the main agree, and will shortly state my reasons for doing so. I think that under the present system the Legislature has expressed its intention that at all events as regards properties fronting on the street in which the work or improvement is done and which are benefited thereby, the cost of the work is to be raised by an equal per foot frontage rate upon such properties, without regard to the fact that they may be unequally benefited, unless the council deem it inequitable to assess lands which, like the appellant's, though fronting on the street in which the improvement is made, are unsuitable for building purposes, at as high a rate as the building lots fronting on the same street, and so determine by the by-law under the authority of section 673 (6).

It is true that section 665 does not say that the rate is to be an equal one. It is to be an annual rate according to the frontage thereof, upon the real property immediately benefited. But sub-section 6 of section 673

Judgment.

OSLER,
J.A.

necessarily implies that in the absence of action taken by the council thereunder proportioning the cost of the work or improvement in cases where the various portions of the property to be taxed may be unequally benefited, the rate must be an equal one along the whole frontage of the properties assessed. Other provisions of this group of sections point in the same direction, *e.g.*, section 665, sub-section (3), and its proviso, and section 674 (2), (3), where the assessment of particular classes of land for the proportion of benefit received from the work or improvement is contrasted with the assessment by a frontage rate.

It is true also that by section 664 (1) power is conferred upon the council to pass the by-law for providing means not only of determining what real property will be immediately benefited by the proposed work, but also of ascertaining and determining the proportions in which the assessment of the cost thereof is to be made on the various portions of "real estate" so benefited, and further, that by clause (a) of the same sub-section it is declared that there shall be the same right of appeal from any such assessment or proposed scale of assessment (the latter words referring, I presume, to what in the earlier part of the section is spoken of as "the proportion in which the assessment is to be made") to the Court of Revision and the County Judge as is provided for by the Municipal Drainage Act. And the general local improvement by-law of the city passed in November, 1894, does require the engineer to report upon both of these subjects.

If this section stood alone, I think it could not be successfully contended that each parcel of property was not legitimately the subject as, on every principle of justice and equity it ought to be, first of enquiry and report by the engineer, and thereafter, if necessary, of appeal to the Court of Revision and the County Judge, both as to benefit and the proportions in which as between themselves the "various portions" of the properties benefited should be assessed for the cost of the scheme: *Philadelphia v. Rule*

(1880), 93 Pa. St. 15; *Loeb v. Columbia Township* (1899), 91 Fed. Rep. 37. The difficulty is to reconcile these provisions with section 673 (6), a clause which first appeared as section 614 of the Municipal Act of 1883, 46 Vict. ch. 18 (O.), and which expressly requires the special exercise *pro hac vice* of a discretion by the council, which never was the subject of appeal, to determine the proportion in which the cost of the improvement shall be borne among themselves by the lands on each side of a street, if in their opinion, some should not be assessed "as high a rate" as others. In the absence of the exercise of such discretion by the council that section certainly implies that the proportion of the cost of the work must be borne by an equal frontage rate in any particular street.

Judgment.

OSLER,
J.A.

It must be conceded that the Acts of 1883 and 1885 [48 Vict. ch. 39 (O.)] would not have admitted of this solution. For (1) there was no property taxable but that on the street which fronted the improvement, and (2) the rate was a special rate on the property in that street only.

The only method by which, as it seems to me, these apparently conflicting enactments can be reconciled as they stand in the present Act is to treat the "proportions" which are to be the subject of enquiry by the engineer and of the appeals given by 674 (1) (a), as proportions to be borne as between properties benefited fronting on the street in which the improvement is made and properties which are also benefited but fronting on some other street. Perhaps, also (where a by-law has been passed for the purpose), the case provided for by section 673 (4), "corner and irregular lots," and the peculiar clause 664 (6). This view is supported by the other sections I have referred to, which indicate that where the proportions in which the different classes of property are to contribute have been ascertained by the engineer, the assessment thereof is to be by an equal frontage rate on each class, and not one according to the proportion of benefit received. Generally speaking, the benefit derived or derivable by all the frontagers on the improvement from such a work as a sewer or

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OSLER,
J.A.

other local improvement in a street must be practically alike. It is really only where other properties are brought into the scheme as being benefited by it that a question of difference in the amount of benefit and in the incidence of the cost plainly arises. The Legislature may well have deemed it desirable to confer upon the council only the right to say that, from its peculiar situation, property of a certain description should be partially relieved by imposing thereon a smaller proportion of the cost of the work.

I share the difficulty experienced by the Divisional Court in deriving any satisfactory argument in support of the respondents' case from sub-section 6 of section 671. If it can be held to apply to an appeal under a general by-law like that in question here, it no doubt aids the view that the frontage rate must be an equal one, and cannot in that respect be interfered with; but I do not rely upon it because the by-law is not such a by-law as is mentioned in sub-section (3) of that section.

The difficulties which confront us in this case and others which lie on the surface of the patchwork of clauses 664-685 under which the local improvement system is worked, mainly arise out of the departure from the comparative simplicity of the system as settled in the Act of 1883, which limited the rate to an annual rate according to the frontage upon the real property fronting or abutting upon the street or place wherein the improvement was made. It was easy to work that system by means of a general by-law as provided by the Act of 1885, section 36, but it is not so easy to apply a general by-law to the present system where other properties may be brought into the scheme, to deal with which the special action and authority of the council are necessarily called for. I do not see at what stage of the proceedings of an assessment carried out under a general by-law the council can exercise the powers given by 673 (2), (6); 674 (1), (2), or 665 (3). The general by-law which may be passed under section 667 seems to me to be such a by-law as is mentioned in

section 671 (3) providing for a frontage rate on the frontages on the improvement only. This question, however, is not before us, and I only refer to it because it prominently suggests itself when the application of the proviso of section 671 (6), so much relied upon by the respondents, is considered.

It is hardly necessary to add that if the construction I place upon the statute be the right one, the Court of Revision is equally without jurisdiction to interfere with the assessment as regards the amount of the rate.

It was strongly urged upon us that as the County Judge had passed upon the question, and sent his direction to the clerk, it was too late to grant prohibition. But no formal order had been drawn up or issued, if that is necessary to be relied upon; the absence of jurisdiction appears upon the face of the proceedings, and the Judge's direction had not been acted upon. Prohibition, therefore, well lies: see *Buggin v. Bennett* (1767), 4 Burr. 2035; and the well-known passage in the celebrated judgment of Willes, J., in *Lord Mayor of London v. Cox* (1867), L. R. 2 H. L. at p. 282.

I sympathize with the applicant's natural sense of the serious injustice which has been inflicted upon him by the proceedings of the council, but his remedy must be sought by legislation; the Court is powerless to interfere.

MACLENNAN, J.A. :—

The substantial question in this appeal, that is, whether the learned County Court Judge was right in reducing the assessment against the appellant's land, is one of considerable difficulty, depending as it does upon the proper construction of a number of sections of the Municipal Act, passed at different times in the last forty years. Upon the best consideration I have been able to give to it, I think the learned Judge was wrong, and exceeded his power.

The local improvement legislation may be said to have been first enacted in 1859, 22, Vict. ch. 40, afterwards

Judgment.

OSLER,
J.A.

Judgment. section 299 and following sections of chapter 54, Consolidated Statutes of Upper Canada. By section 299 the municipality had a choice of five different modes of assessing and levying the cost of the improvement upon land to be immediately benefited thereby: first, by an annual rate on the dollar, according to the assessed value, including improvements; second, by a similar annual rate, excluding improvements; third, by an annual rate per foot, equally, according to the frontage, without reference to the comparative value of different portions; fourth, by an annual rate on each portion, in proportion to benefit; and fifth, partly by each of the other methods, or partly by each of any two or three of them. In other respects the power of the council was substantially as at present, and an appeal was given, just as at present, to the County Judge, except that perhaps there was no intermediate appeal to the Court of Revision. Now, I think it is plain that under that Act the choice of the mode of assessment was exclusively a matter for the council, and was not at all a subject of appeal; and if, in its discretion, it adopted the plan of frontage assessment, a person assessed could not have that changed, by appeal to the County Judge, to an assessment according to benefit, or *vice versâ*. The law continued unchanged until the year 1866, when by 29 & 30 Vict. ch. 51, sec. 301, sub-sec. 2 (1), all the methods of assessment were repealed except the second, and from that time, the only method authorized was by an annual rate on the dollar, on the property benefited, according to its value, exclusive of improvements. There was no authority to take into consideration the question of benefit, or to regulate the assessment thereby. The next change was made in 1881, by 44 Vict. ch. 24, sec. 26 (O.), which simply repealed the words "by an annual rate in the dollar on the real property so benefited, according to the value thereof, exclusive of improvements," and substituted therefor the words, "by means of an annual special rate on the real property so benefited, according to the frontage thereof." These are not the exact words which had been

MAOLENNAN,
J.A.

used in the Act of 1859, method No. 3; the word "equally" is omitted, and so also are the words, "without reference to the comparative value of different portions." The omission of the last words does not help the appellant, for the Legislature had just repealed the enactment which required comparative value to be regarded, neither does the omission of the word "equally." It was not intended that each property assessed should be assessed for an equal sum. What the assessment is to do is to distribute the whole burden between the several properties benefited. The cost of the work is not only to be assessed, but levied by means of a rate according to the frontage. If the quantum of benefit were to be regarded, the frontage would be quite immaterial, and would afford no assistance in distributing the burden. Each owner would have to pay his proportion, according to the amount of his benefit, whether his frontage was much or little.

Judgment.

 MACLENNAN,
 J.A.

Having regard, therefore, to section 664 and section 665 (1), I think it is plain that the question of benefit is not an element to be regarded in making the assessment; and I think that conclusion is emphasized by the language of section 665 (1), which declares that the rate shall be according to the frontage, except in the case mentioned in sub-section (3), where, apparently, the council may apply the principle of proportionate benefit to the whole scheme.

Now, I do not find that there are any other provisions in the Act which at all weaken or qualify this conclusion. No doubt, under section 671 (6) (e), the Judge may find that a property cannot be benefited at all by the proposed work, and in that case may strike it out of the assessment altogether; but I think it is plain that, if there be found any benefit at all, the frontage rate must be allowed to stand.

We were also pressed with section 673 (6), where there is express authority given to the council to reduce the rate of assessment, wherever, in its opinion, lands on either side of a street are unfit for building purposes. I think, however, that is a matter for the council, and that its

Judgment. opinion is not subject to appeal. To my mind it is significant, and indeed conclusive, that except in the special cases named there is no provision whatever for ascertaining the quantum of benefit, or the comparative benefit, as between particular properties. That is not an element to be considered by the Judge upon the appeal to him given by the Act.

MACLENNAN,
J.A.

It was, however, also urged by the appellants that there being no act remaining to be done by the learned Judge, and therefore nothing to prohibit, the order ought not to have been made. The facts seem to be clear that the appeal was heard before the learned County Judge on the 28th of April, 1898, that judgment was reserved, and was given on the 16th of June afterwards. That judgment was reduced to writing, was signed by the Judge, and was delivered to the city clerk on the same day. The notice of motion for prohibition was not served until the 22nd or 23rd of June. In the first part of the reasons against appeal the respondents say that no order had been issued or drawn up embodying the learned Judge's decision, and that he had announced to the parties his intention to reduce the assessment of the appellants, but as the questions involved were important he had expressly refrained from any steps to enforce his intended decision until the matters involved could be passed upon by a Judge of the High Court. I have seen no evidence to support this statement, and have through the Registrar enquired of counsel for the respondents what evidence was relied on. I have not, however, been referred to any, except a memorandum, of the date of the 23rd of June, endorsed by the County Judge upon the notice of motion for the prohibition in the following terms: "I quite approve of the motion for prohibition herein. I have much doubt about the construction to be placed on paragraph (e) and of sub-sec. 6 of sec. 671 of the Municipal Act, and will be glad to have an authoritative decision thereon."

This memorandum, made a week after the decision, clearly does not go to shew that the learned Judge refrained

from deciding the matter before him, or had merely intimated an intended decision to the parties. By sections 664 and 671 (5) of the Municipal Act, the proceedings on appeals are to be the same as in appeals from ordinary assessments under the Assessment Act, R. S. O. ch. 224. By that Act, section 76, the person having charge of the assessment roll is required to appear at the hearing of the appeal and to produce the roll, when it is to be altered and amended according to the decision of the Judge, if then given, and the Judge is to write his initials against the corrections, if any ; but if the decision is not then given, the clerk of the Court shall, when the same is given, forthwith alter and amend the roll according to the decision, and shall write his name against every alteration and correction. The clerk of the Court here referred to is the clerk of the municipality, section 75 (6) ; and by section 82 it is declared that the decision of the Judge shall be final and conclusive in every case adjudicated, and the clerk of the municipality shall amend the rolls accordingly. It appears, therefore, that the Judge gave his decision on the 16th of June, and I think that after that nothing more remained for him to do. Whatever was to be done further was to be done by the clerk of the municipality. There is no provision that the Judge should order him to amend the assessment. He required no such order, for the statute made it his duty to do so. I am therefore obliged to hold that the application to prohibit the Judge was made too late. There was nothing to prohibit, and the order was *brutum fulmen*. After a somewhat diligent search I have found no case in which prohibition was granted when nothing remained to be done. The reason of the thing is itself almost conclusive against such a proceeding. The Court will not make a clearly useless order. There are many cases in which prohibition has been granted after judgment or sentence, but only where the judgment or sentence might be, or was being, enforced by other proceedings. *Darby v. Cosens* (1787), 1 T. R. 552, was a case in which after an appeal, and the case remitted to the lower

Judgment.

MACLENNAN,
J.A.

Judgment. Court, the appellate Court was prohibited because its process was being used to recover the costs of the appeal.
MACLENNAN, J.A.

I am therefore of opinion that the appeal should be allowed, and that the motion for prohibition should be dismissed with costs. The appellant should also have his costs of the appeal both to this Court and the Divisional Court.

MOSS, J.A. :—

I agree with my brother Osler.

LISTER, J.A. :—

I agree with the Chief Justice upon the question of the mode of assessment, and with my brother Maclelennan upon the question of prohibition.

Appeal allowed, OSLER, and MOSS, JJ.A., dissenting.

R. S. C.

APPENDIX.

MOLSONS BANK V. COOPER.

Collateral Security—Crediting Proceeds—Suspense Account—Banks.

A bank gave a customer "a line of credit to \$150,000, to be secured by collections deposited :"—

Held, that the bank was bound to credit the customer with the payments made from time to time to the bank on collateral notes deposited with the bank by the customer in accordance with the terms of the memorandum, and could not hold the payments in a suspense account until the maturity of the customer's own paper given to the bank to cover the line of credit, and take judgment against the customer for the full amount of that paper.

Judgment of the Supreme Court of Canada, 26 S. C. R. 611, affirmed.

AN appeal by the plaintiffs (by special leave) from the Statement.
judgment of the Supreme Court of Canada, reported 26 S. C. R. 611, was argued before The Judicial Committee of the Privy Council, [The Lord Chancellor, Lord Herschell, Lord Macnaghten, Lord Morris, and Sir Richard Couch] on the 9th of March, 1898. See also 23 A. R. 146; 26 O. R. 575.

Shepley, Q.C., and *W. E. Hume-Williams*, for the appellants.

The respondents were not represented.

At the conclusion of the argument the judgment of the Committee was delivered by

LORD HALSBURY, L. C.:—

In this case their Lordships are of opinion that the appeal ought to be dismissed with costs. Their Lordships think it is right that in the first instance it should be pointed out that this appeal has not been argued on the question of *res judicata*. Their Lordships do not consider that it was open to the appellants here, to argue that question. No leave to appeal on that subject was, certainly, intended to be given, and their Lordships, in view of what took place on the application for special leave to appeal, are of opinion that no such leave was given.

Judgment.HALSBURY,
L.C.

The only question, therefore, before their Lordships at present is, what is to be done in reference to the judgment which has been delivered on points other than those involved in the question of *res judicata*; and on these points their Lordships are of opinion that the matter is not open to doubt. The whole question turns, first of all, on the construction to be placed upon the contract between the parties. That consisted of a letter written by the bank to the defendants in the action: "I am pleased to inform you that our board have granted you a line of credit to \$150,000, to be secured by collections deposited. Rate 6 per cent. The meaning of the above is not that the advance shall be fully covered by collections, but as near as you can." It appears that the bank had, at the time when the question arose, in pursuance of that contract, and by collections, received and realised sums amounting to \$83,000. They brought an action which appears, together with what they had received already in that respect, to have represented \$145,000, namely, the entire amount which was said to be due. This raises the question whether they are entitled to treat those sums of money which they have received in fact upon the realisation of these so-called securities, as not having been received and to recover in respect of the entire amount of the indebtedness, treating the indebtedness as \$145,000. Their Lordships are of opinion that no such right can possibly exist. The bargain between the parties is intelligible enough, and is a very common one; that an overdraft should be allowed, and that cheques, bills, and securities, and so on, should be deposited. The parties apparently have made their meaning very clear by saying that "The meaning of the above is not that the advance shall be fully covered by collections, but as near as you can." The facts upon which their Lordships have to proceed are found in a way that is not disputed, namely, that this sum of \$83,000 had been received. The Chief Justice says: "Although the bank credited the amount they had collected from the collaterals to an account in its books called a suspense account, it does not appear that they set

apart the fund or separated it in any way from their other moneys with which they carried on their business as bankers. The presumption, therefore, is that they have been and are making profits of this money belonging to the appellants, for which they render no account to the appellants and give them no credit by way of interest or otherwise, whilst at the same time they are seeking to charge the appellants with interest on the judgments which they have recovered." It is not quite certain that it is very important whether that was so or not. It puts in a more striking light, perhaps, the injustice which would be done by enabling the bank to do as they have thought proper to do; but what strikes their Lordships is that if they received the money, or if they turned their securities into money at the time that they did receive those securities or at the time they received the money, it is impossible to say that the indebtedness between themselves and the debtor was otherwise than diminished by the amount of money which they put into their pockets. It is a very simple matter if looked at in that way; and one source of the confusion, that has apparently arisen in the course of some of these judgments and the arguments upon them, is that the word "security" has been somewhat inaccurately used. When the collection was made by the bank, they were realising their securities, in this sense, that the cheques or bills, or whatever they were, that were handed to them, they turned into money. When they turned them into money they were the creditors, and they could not help diminishing *pro tanto* the indebtedness between themselves and their debtor, when they had got the money which those securities represented in their hands. Such a thing was never heard of as turning the security into money and then claiming to have the original debt remaining at the original sum at which it previously existed. Their Lordships are of opinion that the only question which could have arisen, and ought to have arisen, at the time that this action was tried, was the amount of indebtedness between the plaintiffs and the defendants. Nothing that could have been said or done at that time

Judgment.

HALSBURY,
L.C.

Judgment.
HALSBURY,
L.C.

either the solvency or the insolvency of the defendants, or the question of what has been described as the ranking right before the sheriff, when the judgment was ultimately arrived at, could have affected the question of the amount of the judgment which ought to have been recovered at the time this action was tried; and, indeed, the sheriff would have no jurisdiction to deal with the amount of the judgment. The fallacy throughout has been that this is a sort of accounting in which there is to be a question whether or not the amount at which the debt originally stood was to be treated, for some technical purpose or another, as still existing, and that, at some future time (what time, their Lordships think, has not been accurately stated) there is to be some general accounting in which all these things could be set out. No such question could have arisen or ought to have arisen before the Judge who tried this cause. The question which he had to determine was what was the amount of the indebtedness then existing between the parties; and when that question had been ascertained by proof of what was still due between the creditor and the debtor, that was the amount for which judgment ought to have been given. Really a very simple question becomes somewhat confused when one begins to enter into other questions of some supposed rights of sureties or principals *inter se*. No such questions arise. The things which were handed over as securities for the debt were realised and turned into money, and when the creditor is suing his debtor for the amount of indebtedness which exists at that time, the amount the creditor has received in money in respect of these matters, clearly, must be taken from the debt, because at that moment the debt has been to that extent paid as between these two persons, and for that amount, and for that amount only, ought judgment to have been recovered.

For these reasons, their Lordships think that the appeal should be dismissed. The respondents did not appear by counsel at the argument, but they lodged a printed case; and costs up to the hearing will be paid by the appellants to the respondents.

APPENDIX II.

Cases reported in the Ontario Appeal Reports disposed of by the Judicial Committee of the Privy Council and by the Supreme Court of Canada, since the publication of Volume 25, up to December 31st, 1899.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

WASHINGTON V. GRAND TRUNK R. W. CO., 24 A. R. 183; 28 S. C. R. 184.—Appeal dismissed; February 24th, 1899: [1899] A. C. 275.

SUPREME COURT OF CANADA.

CASTON V. CONSOLIDATED PLATE GLASS CO., 26 A. R. 63.—Appeal allowed; June 6th, 1899: 29 S. C. R. 624.

COCKBURN V. IMPERIAL LUMBER CO., 26 A. R. 19.—Appeal allowed; October 24th, 1899.

GOLD MEDAL FURNITURE MANUFACTURING CO. V. LUMBERS, 26 A. R. 78.—Appeal allowed; October 24th, 1899.

GOOD V. TORONTO, HAMILTON AND BUFFALO R. W. CO., 26 A. R. 133.—Appeal dismissed; November 29th, 1899, *sub nom.* DOMINION CONSTRUCTION CO. V. GOOD.

GREAT NORTHERN TRANSIT CO. V. ALLIANCE INSURANCE CO., 25 A. R. 393.—Appeal allowed; June 5th, 1899; 29 S. C. R. 577, *sub nom.* LONDON ASSURANCE CORPORATION V. GREAT NORTHERN TRANSIT CO. Leave to appeal refused by the Judicial Committee; July 22nd, 1899.

HENDERSON V. CANADA ATLANTIC R. W. Co., 25 A. R. 437.—Appeal dismissed; June 7th, 1899; 29 S. C. R. 632.

JAMIESON V. LONDON AND CANADIAN LOAN AND AGENCY Co. (No. 2), 26 A. R. 116.—Appeal dismissed; October 24th, 1899.

KERVIN V. CANADIAN COLOURED COTTON MILLS Co., 25 A. R. 36.—Appeal allowed; May 30th, 1899; 29 S. C. R. 478.

LOGAN V. MCKILLOP, 25 A. R. 498.—Appeal allowed; October 3rd, 1899; 29 S. C. R. 702.

ROBINSON V. PURDOM, 26 A. R. 95.—Appeal dismissed; October 24th, 1899.

SPARKS V. WOLFF, 25 A. R. 326.—Appeal dismissed; June 5th, 1899; 29 S. C. R. 585.

WARD V. WILBUR, 25 A. R. 262.—Appeal dismissed; June 5th, 1899; 29 S. C. R. 572, *sub nom.* GREEN V. WARD.

A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME

BEING DECISIONS IN THE

COURT OF APPEAL FOR ONTARIO.

ACCELERATION CLAUSE.

See MORTGAGE.

ACCOUNT.

See MORTGAGE.

ACKNOWLEDGMENT.

See LIMITATION OF ACTIONS.

ACT OF GOD.

See DRAINAGE, 1.

ACTION.

Jurisdiction — Canadian Pacific Railway Company—Negligence in Another Province—Service of Writ.

—In an action brought here against the Canadian Pacific Railway Company by the personal representative, appointed in this Province, of a person killed in British Columbia through the negligence there of servants of the company the writ may be served on the defendants in this

Province in accordance with the provisions of Consolidated Rules 159 and 160.

Judgment of MEREDITH, J., '29 O. R. 654, affirmed. *Tytler v. Canadian Pacific R. W. Co.*, 467.

See DITCHES AND WATERCOURSES ACT.

ALTERATION.

See EVIDENCE.

AMENDMENT.

See DRAINAGE, 3.

APPEAL.

See COURT OF APPEAL.

ARBITRATION AND AWARD.

See DITCHES AND WATERCOURSES ACT—MUNICIPAL CORPORATIONS, 4
—WATER AND WATERCOURSES, 1.

ARREST.

Foreigner—Staying Temporarily in Ontario.—A foreigner, who contracts a debt in the country of his domicile and then comes to this Province to stay temporarily, cannot be arrested here in respect of that debt, when in good faith about to leave this Province to return home.

Judgment of a Divisional Court reversed. *Elgie v. Butt*, 13.

ASSESSMENT AND TAXES.

1. *Failure to Distrain—Enforcing Payment in a Subsequent Year.*—Where during all the time the roll is in the collector's hands there are goods and chattels available to answer the taxes but the collector fails to distrain, the amount due cannot be added to the taxes for a subsequent year and then levied by distress upon the goods of the tax debtor.

The provisions of section 135 of R. S. O. (1887) ch. 193, [R. S. O. ch. 224, sec. 147], requiring the collector to state the reason for his failure to collect taxes and to furnish a duplicate of his account to the clerk are imperative and if they are not observed the amount due cannot be added to the taxes for a subsequent year and then levied by distress upon the goods of the tax debtor.

Judgment of a Divisional Court, 30 O. R. 16, affirmed. *Caston v. The City of Toronto*, 459.

2. *Local Improvements—Mode of Assessment—Appeal—County Court Judge — Prohibition.*—When a sewer is being constructed by a municipal corporation under the

local improvement system and land not fronting on the street in question is benefited as well as land fronting thereon, the proper method of assessment is to determine what proportion of the cost the land fronting on the street shall bear, and what proportion the land not so fronting shall bear, and to assess the proportion payable by each class according to the total frontage of that class, and not according to the benefit received by the lots in that class *inter se*.

Semble: Such an improvement and the assessment therefor must be carried out under the provisions of a special by-law, not under a general by-law passed pursuant to section 667.

Judgment of a Divisional Court, 30 O. R. 158, affirmed, BURTON, C.J.O., and LISTER, J.A., dissenting.

But held also, reversing that judgment, OSLER, and MOSS, J.J.A., dissenting, that after the County Court Judge had, on appeal by an owner, given his decision, on a day subsequent to the argument, it was too late to obtain an order for prohibition against him. *In re Robertson and City of Chatham*, 554.

ASSESSMENT NOTE.

See INSURANCE, 3.

ASSIGNMENT.

See LANDLORD AND TENANT, 2.

ASSIGNMENTS AND PREFERENCES.

See BANKRUPTCY AND INSOLVENCY.

ATTORNEY-GENERAL.*See* COURT OF APPEAL, 1.**BALLOT.***See* MUNICIPAL ELECTIONS.**BANKRUPTCY AND
INSOLVENCY.**

1. *Assignments and Preferences—Payment of Money—Cheque.*—A trader in insolvent circumstances sold his stock-in-trade in good faith and directed the purchaser to pay as part of the purchase money a debt due by the trader to his bankers, who held, as collateral security, a chattel mortgage on the stock-in-trade. The purchaser had an account with the same bankers, and gave to them a cheque on this account for the amount of their claim, there being funds at his credit to meet the cheque:—

Held, that this was a payment of money to a creditor and not a realization of a security, and that the bankers were not liable, in a creditor's action, to account for the amount received.

Davidson v. Fraser (1896), 23 A. R. 439, 28 S. C. R. 272, distinguished, on the ground that the cheque never was the property of, or under the control of, the insolvent.

Judgment of ARMOUR, C. J., affirmed. *Gordon Mackay & Company v. The Union Bank of Canada*, 155.

2. *Assignments and Preferences—Sale of Assets—Extinguishment of Debt—Practice—Joint Debtors—Judgment—Consolidated Rules 587, 603, 605.*—An assignment of the assets of a partnership was duly

made pursuant to the provisions of the Assignments and Preferences Act, and the assignee, with the approval of the creditors, sold and transferred the assets to a nominee of the plaintiffs and two other creditors of the firm in consideration of the payment to the other creditors of a composition, and subject to the claims of these three creditors. The purchaser covenanted with the assignee to settle the claims of these three creditors and to indemnify him therefrom:—

Held, that the claims of these three creditors were thus made part of the purchase money, and were extinguished by the transfer of the assets.

A judgment recovered against one or more of partners or other joint debtors under Consolidated Rules 587, 603, and 605, does not prevent the plaintiff from proceeding in the same action to judgment against the other defendants.

McLeod v. Power, [1898] 2 Ch. 295, distinguished.

Judgment of MACMAHON, J., affirmed. *Dueber Watch Case Manufacturing Co. v. Taggart*, 295.

See FRAUDULENT CONVEYANCE.

BANKS.

See COLLATERAL SECURITY.

BELL TELEPHONE COMPANY.

See MUNICIPAL CORPORATIONS, 6.

BENEVOLENT SOCIETY.

Insurance—Will—Change in Rules—Creditors.—In his application for membership in a benevolent society the applicant directed that

the amount to which he should be entitled should be paid "subject to my will," and the certificate, issued in 1889, provided that at the death of beneficiary, if then in good standing, "his heirs and legal representatives shall be entitled to receive the amount collected upon an assessment not exceeding \$3,000, and he now directs that in case of his death the said sum be paid subject to his will."

The insured died on the 5th of January, 1897, having on the 12th of September, 1896, made his will by which he directed his debts to be paid, and gave "all the rest and residue" of his estate to his wife, who survived him. At the time of the issue of the certificate the rules of the society provided that moneys payable under a beneficiary certificate should be paid to such person as the member while living might have directed, but there was no provision as to payment in the event of an invalid appointment or of want of appointment. In July, 1896, new rules were passed limiting the persons who could take as beneficiaries and excluding expressly creditors and persons designated only by will:—

Held, that the new rules did not affect certificates then existing and that the insured's executors were entitled to the amount (fixed at \$1,500) for distribution among the insured's creditors.

Johnston v. Catholic Mutual Benevolent Association (1897), 24 A. R. 88, distinguished.

Judgment of STREET, J., affirmed.

Fawcett v. Fawcett, 335.

See ESTOPPEL—INSURANCE.

BILLS OF SALE.

See SALE OF GOODS.

BRANCH DRAINS.

See DRAINAGE, 3.

BY-LAWS.

See DRAINAGE, 5.

CANADIAN PACIFIC RAILWAY COMPANY.

See ACTION.

CANCELLATION OF POLICY.

See INSURANCE, 1.

CASES.

In re Burley (1865), 1 C. L. J. 34, approved.]—*See* CRIMINAL LAW.

Castellain v. Preston (1883), 11 Q. B. D. 380; 31 W. R. 558, specially referred to.]—*See* INSURANCE, 2.

Castor v. Uxbridge (1876), 39 U. C. R. 113, approved.]—*See* MUNICIPAL CORPORATIONS, 5.

Davidson v. Fraser (1896), 23 A. R. 439, 28 S. C. R. 272, distinguished.]—*See* BANKRUPTCY AND INSOLVENCY, 1.

Gregory v. Williams (1817), 3 Mer. 582, applied.]—*See* TRUST.

Hall v. North-Eastern R. W. Co. (1875), L. R. 10 Q. B. 437, applied.]—*See* RAILWAYS.

Johnson v. Allen (1895), 26 O. R. 550, not followed.]—*See* MUNICIPAL ELECTIONS.

Johnston v. Catholic Mutual Benevolent Association (1897), 24 A. R. 88, distinguished.]—See BENEVOLENT SOCIETY.

McLeod v. Power, [1898] 2 Ch. 295, distinguished.]—See BANKRUPTCY AND INSOLVENCY, 2.

Mulholland v. Merriam (1872), 19 Gr. 288, applied.]—See TRUST.

Regina v. Morton (1868), 19 C. P. 9, approved.]—See CRIMINAL LAW.

Salomon v. Salomon, [1897] A. C. 22, applied.]—See FRAUDULENT CONVEYANCE.

Wood v. Reesor (1895), 22 A. R. 57, applied.]—See FRAUDULENT CONVEYANCE.

CATTLE DROVER.

See RAILWAYS.

CERTIFICATE.

See CONTRACT, 2.

CHAMPERTY.

See SOLICITOR.

CHEQUE.

See BANKRUPTCY AND INSOLVENCY, 1.

COLLATERAL SECURITY.

Crediting Proceeds — Suspense Account—Banks.]—A bank gave a customer “a line of credit to \$150,000, to be secured by collections deposited :”—

Held, that the bank was bound to

credit the customer with the payments made from time to time to the bank on collateral notes deposited with the bank by the customer in accordance with the terms of the memorandum, and could not hold the payments in a suspense account until the maturity of the customer's own paper given to the bank to cover the line of credit, and take judgment against the customer for the full amount of that paper.

Judgment of the Supreme Court of Canada, 26 S. C. R. 611, affirmed. *Molsons Bank v. Cooper*, Appendix.

COLOURABLE USER.

See EASEMENT.

COMPANY.

See FRAUDULENT CONVEYANCE.

COMPENSATION.

See MUNICIPAL CORPORATIONS, 4.

CONDITIONS.

See CONTRACT, 2—TRUST.

CONNECTING LINES.

See RAILWAYS.

CONSTITUTIONAL LAW.

Justice of the Peace—Stated Case—Court of Appeal—R. S. O. ch. 91, sec. 5.]—A case can be stated by a justice of the peace under R. S. O.

ch. 91, sec. 5, for the judgment of the Court of Appeal only when the constitutional validity of a statute is involved and not when the decision depends merely upon whether the statute is or is not applicable to the defendants.

It was held, therefore, that an appeal, by way of stated case, would not lie from the decision of the police magistrate of the city of Toronto, that the Toronto Railway Company were bound by a by-law of the corporation, passed under the authority of the Municipal Act, directing them to put vestibules on their cars, the company contending that the by-law and the Municipal Act did not apply because their line crossed the lines of Dominion railways, thus making their undertaking a work for the general advantage of Canada and subject only to Dominion regulation. *Regina v. The Toronto Railway Co.*, 491.

See COURT OF APPEAL, 1—ICE.

CONTRACT.

1. *Impossibility—Damages.*—No action lies for the non-performance of a term of a contract which term is on its face impossible of performance by any of the parties.

Where, therefore, a contract was made by a company for the electric lighting of a city for a named number of nights before a fixed date at a fixed rate per light per night, there not being as many as the named number of nights before that date, and the company did not supply lights the nights that there were, and were not prevented from doing so by the city, it was held that they were not entitled to recover at the contract rate for the named number

or for more than the nights actually lighted.

Judgment of STREET, J., affirmed. *The Stratford Gas Co. v. The City of Stratford*, 109.

2. *Conditions—Reference to Engineer.*—The rule that a contractor is bound by a condition in his contract making the employer's engineer the interpreter of the contract and the arbiter of all disputes arising under it, does not extend to a case where the named engineer, while in fact the engineer of the employer, is described in the contract as, and is supposed by the contractor to be, the engineer of a third person.

Judgment of ARMOUR, C.J., affirmed. *Good v. The Toronto, Hamilton and Buffalo R. W. Co.*, 133.

3. *Partial Performance—Quantum Meruit.*—Where there is a contract to do specified work for a fixed sum, with a proviso for payment of proportionate amounts, equal to eighty per cent. of this fixed sum, as the work is done and the balance of twenty per cent. in thirty days after completion and acceptance, completion is a condition precedent to the right to payment, and where the work is not completed there is no right to recover for the portion done as upon a quantum meruit.

Judgment of a Divisional Court affirmed. *Sherlock v. Powell*, 407.

4. *Specific Performance—Parent and Child—Agreement to Compensate—Improvements.*—*Smith v. Smith*, 397.

See MASTER AND SERVANT, 3.

CONVICTION.

See COURT OF APPEAL.

COSTS.

See COURT OF APPEAL, 1.

COUNTY COURT JUDGE.

See ASSESSMENT AND TAXES, 2.

COURT OF APPEAL.

1. *Order of Divisional Court Quashing Conviction—Constitutional Question—Certificate of Attorney-General—R. S. O. ch. 91, sec. 3—Inadvertence—Quashing Appeal—Costs.*—The Attorney-General certified his opinion, pursuant to sec. 3 of R. S. O. ch. 91, that the decision of the High Court quashing a conviction made under an Ontario statute involved a question on the construction of the British North America Act, and an appeal from such decision was brought on in the regular way; but, as it plainly appeared to the Court of Appeal that the decision involved no such question, and the certificate of the Attorney-General appeared to have been granted inadvertently, in consequence of an authentic copy of the reasons for the judgment of the Court below not having been brought before him, the appeal was quashed, and with costs to be paid by the prosecutor, the appellant, whose proceeding was in the nature of a *qui tam* action. *Regina v. Reid*, 181.

2. *Jurisdiction—Criminal Law—Order Quashing Conviction.*—No appeal lies to the Court of Appeal for Ontario from an order of a Divisional Court quashing a conviction by a police magistrate for breach of a municipal by-law. *Regina v. Cushing*, 248.

See ASSESSMENT AND TAXES, 2—
CONSTITUTIONAL LAW.

COVENANT.

See LANDLORD AND TENANT, 1, 3.

CRIMINAL LAW.

Extradition—Forgery—Initiating Prosecution.—The prisoner, using an assumed name, represented himself to a shopkeeper to be a traveller for a certain wholesale firm, and after going through the form of taking an order for goods, obtained the endorsement of the shopkeeper to a draft drawn by him in his assumed name on this firm, and this draft was then cashed by him at a bank:—

Held, that this was forgery and that the prisoner should be extradited.

A prosecution under the Extradition Act may be initiated by any one who, if the offence had been committed in Canada, could put the criminal law in motion.

In re Burley (1865), 1 C. L. J. 34; *Regina v. Morton* (1868), 19 C. P. 9, approved.

Judgment of MEREDITH, C. J., 30 O. R. 419, affirmed. *In re Lazier*, 260.

See COURT OF APPEAL.

CULTIVATION OF LAND.

See WATER AND WATERCOURSES, 2.

DAMAGES.

See CONTRACT, 1—MASTER AND SERVANT, 2—MUNICIPAL CORPORATIONS—WAREHOUSEMAN.

DEBENTURES.

See DRAINAGE, 5.

DECLARATION OF RIGHT.

See REVENUE.

DEED.

See EVIDENCE.

DEFAMATION.

Libel — Newspaper — Fair Comment.]—*Douglas v. Stephenson*, 26.

DEFAULT.

See INSURANCE, 3.

DEFECT IN PLANT.

See MASTER AND SERVANT, 2.

DISCHARGE.

See LANDLORD AND TENANT, 2.

DITCHES AND WATERCOURSES ACT.

Failure to Comply with Award — Action — Purchaser from Party to Award.]—No action lies to recover damages because of failure to comply with an award made under the Ditches and Watercourses Act; the remedy, if any, being under the Act itself.

The purchaser of land from an owner who was a party to proceed-

ings under the Act in respect of that land is entitled to enforce the award.

Judgment of a Divisional Court reversed. *Dalton v. Township of Ashfield*, 363.

DOUBLE INSURANCE.

See INSURANCE, 1.

DRAINAGE.

1. *Want of Repair—Act of God.*]—Where a drain is out of repair and lands are injured by water overflowing from it the municipality bound to keep it in repair cannot escape liability on the ground that the injury was caused by an extraordinary rainfall unless it is shewn that even if the drain had been in repair the same injury would have resulted.

Judgment of the Drainage Referee reversed. *Mackenzie v. Township of West Flamborough*, 198.

2. *Outlet — Drainage Act, 1894, sec. 75.*]—A drainage scheme under section 75 of the Drainage Act, 1894, cannot be upheld if the engineer does not make provision for a sufficient outlet for the water dealt with.

Judgment of the Drainage Referee reversed. *In re Township of Raleigh and Township of Harwich*, 313.

3. *Branch Drains—Separate Assessment—Amendment of Engineer's Report.*]—Where it is essential for the purpose of draining an area, a drainage work may include such branch drains as may be necessary, and the main drain and branches may be repaired and enlarged in case of necessity under one joint scheme and joint assessment, a sepa-

rate scheme and separate assessment for the main drain and for each branch not being necessary.

Under sub-sec. 3 of sec. 89 of the Municipal Drainage Act, R. S. O. ch. 226, the Drainage Referee has jurisdiction, with the consent of the engineer and upon evidence given, to amend the engineer's report by charging against the municipalities for "injuring liability" assessments erroneously charged against them by the engineer for "outlet liability."

Judgment of the Drainage Referee reversed. *In re Township of Rochester and Township of Mersea*, 474.

4. *Mandamus—Notice—Damages—Drain Insufficient to Carry Off Water.*—To entitle a person who or whose property is injuriously affected by the condition of a drain to a mandamus for the performance of such work as may be necessary to put the drain in proper condition the notice required by sec. 73 of the Drainage Act, R. S. O. ch. 226, while not necessarily in technical form, must be so clear and precise that the municipality can decide whether the complaint is well founded or frivolous, and must be one which the municipality would be justified in acting upon under sub-section (a) of that section.

A letter referring to defects in the drain, and suggesting steps to be taken, but not calling upon the municipality to do specific work, is not sufficient.

The notice by which proceedings are initiated in Court cannot be regarded as a notice under section 73.

Judgment of the Drainage Referee affirmed.

A person who or whose property is injuriously affected by the condition of a drain is entitled to recover

from the municipality charged with the duty of maintaining it such damages as he sustains by reason of its non-repair, whether caused by the flooding of his land by the waters of the drain, or by failure to carry off the water which came upon the land in the course of nature.

Judgment of the Drainage Referee reversed. *Crawford v. Township of Ellice*, 484.

5. *Debentures—Maintenance—Embanking Work—Registration of By-laws.*—Section 83 of the Drainage Act, R. S. O. ch. 226, directing that the time for payment of debentures issued for the cost of maintenance of a drainage work shall not exceed seven years does not apply to debentures issued for the cost of extending, improving, or altering a drainage work, and the municipality has the same power to issue debentures as in the case of an original drainage work.

Because in the course of the construction of a drainage work banks are formed with the spoil cast from the dredge, the work is not one within sub-sec. 2 of sec. 3 of the Drainage Act, R. S. O. ch. 226; that sub-section relates to the reclamation of wet or submerged lands.

Semle: The provisions of the Municipal Act as to the registration of by-laws for contracting debts apply to by-laws for the issue of debentures for drainage works, and when such by-laws have been registered in accordance with the provisions of the Act they cannot be set aside even if originally *ultra vires*.

Judgment of FERGUSON, J., affirmed. *The Sutherland Innes Co. v. The Township of Romney*, 495.

See WATER AND WATERCOURSES, 2.

EASEMENT.

Right of Way—Limited Grant—Colourable User.—A right of way granted for the benefit of a specific lot cannot be used by the owner of that lot generally apart from his ownership and use of the lot.

Judgment of MEREDITH, J., affirmed. *Robinson v. Purdom*, 95.

ELECTION.

See FRAUDULENT CONVEYANCE—LANDLORD AND TENANT, 3.

ENGINEER.

See CONTRACT, 2.

ESTOPPEL.

Res Judicata—Benevolent Society—Dispute as to Age of Applicant.—After an application for membership in a benevolent association had been accepted a dispute arose as to the applicant's age, and an action was brought by him to compel the association to issue to him a certificate of membership. This action was settled, the association accepting an affidavit of the applicant's brother as proof of his age and thereupon issuing the certificate of membership. Subsequently the association brought this action asking for cancellation of the certificate on the ground that the applicant's age was not in fact that stated by his brother:—

Held, that nothing less than clear proof by the association of the actual age of the applicant, and of fraud in procuring and making the affidavit,

would suffice to undo the settlement and entitle the association to cancellation of the certificate.

Judgment of MEREDITH, C. J., affirmed. *Sons of Scotland Benevolent Association v. Faulkner*, 253.

EVIDENCE.

Deed—Alteration—Proof of Execution—Registry Act—R. S. O. ch. 136, sec. 63.—The production of the registered duplicate original of an instrument with the registrar's certificate endorsed thereon is, by virtue of sec. 63 of the Registry Act, R. S. O. ch. 136, *prima facie* evidence of the due execution thereof, notwithstanding the fact that material alterations appear on the face of the instrument, all questions as to these alterations being however still left open.

Whenever it would be an offence to alter a deed which has been completed, the legal presumption is that material alterations appearing on the face of the deed were made at such a time and under such circumstances as not to constitute an offence. *Graystock v. Barnhart*, 545.

See SCHOOLS.

EXCHEQUER COURT.

See SOLICITOR.

EXTRADITION.

See CRIMINAL LAW.

FAIR COMMENT.

See DEFAMATION.

FICTITIOUS INCORPORATION.*See* FRAUDULENT CONVEYANCE.**FIRE INSURANCE.***See* INSURANCE.**FIXTURES.***Sale — Severance.*] — *Minhinnick v. Jolly*, 42.**FOREIGNER.***See* ARREST.**FORFEITURE.***See* INSURANCE, 3.**FORGERY.***See* CRIMINAL LAW.**FRAUDULENT CONVEYANCE.**

Company—Fictitious Incorporation—Election of Remedies.]—When a limited liability company has been regularly formed in accordance with the Ontario Companies Act, for the purpose of taking over and carrying on the business of a trader who is insolvent, the conveyance of the assets of the latter to the company, though it may be open to attack on the ground that it is fraudulent and void as against creditors under the Statute of Elizabeth or the Assignments and Preferences Act, cannot be set aside at the instance of his creditors on the principle of the

company being merely his *alias* or agent.

Salomon v. Salomon, [1897] A. C. 22, applied.

A creditor cannot take the benefit of the consideration for a conveyance and at the same time attack the conveyance as fraudulent, and therefore where creditors seized shares in a company allotted to their debtor in consideration of the conveyance by him of his assets to the company it was held that they could not attack the conveyance.

Wood v. Reesor (1895), 22 A. R. 57, applied.

Judgment of FALCONBRIDGE, J., 28 O. R. 497, reversed. *Rielle v. Reid*, 54.

FREE PASS.*See* RAILWAYS.**GENERAL AVERAGE.***See* SHIP.**HARBOUR.***See* ICE.**HIGHWAY.**

See MUNICIPAL CORPORATIONS, 1, 2, 5, 6.

ICE.

Water and Watercourses—Constitutional Law—Public Harbour.]—The plaintiff was the owner of a lot bounded by the water's edge of Lake Simcoe, and also of the adjoin-

ing lot covered by the waters of that lake, there not being in the patent of either lot any special reservation of right of access to the shore:—

Held, that he was entitled to the ice which formed upon the water lot and had the right to cut and make use of it for his profit; that no other person was entitled to cut and remove the ice except in the *bonâ fide* and advantageous exercise of the public easement of navigation; and that the defendants were not exercising that easement when they cut channels through the plaintiff's ice in which to float to the shore blocks of ice cut by them beyond the limits of the plaintiff's water lot.

Judgment of MACMAHON, J., 29 O. R. 247, reversed, OSLER, J. A., dissenting.

Held, also, OSLER, J. A., expressing no opinion, that the *locus in quo*, a small bay in Lake Simcoe, at which there was a wharf where, with the permission of the owner, vessels used to call, but no mooring ground and little shelter except from wind off the land, was not a public harbour within the meaning of the British North America Act, and that the plaintiff's grant from the Province was valid. *McDonald v. Lake Simcoe Ice and Cold Storage Company*, 411.

See SHIP.

IMPOSSIBILITY.

See CONTRACT, 1.

IMPROVEMENTS.

See CONTRACT, 4—LANDLORD AND TENANT, 3.

INDEMNITY.

See MUNICIPAL CORPORATIONS, 6.

INFANT.

See CONTRACT, 4—MASTER AND SERVANT, 2—MUNICIPAL CORPORATIONS, 5.

INSTALMENT.

See MORTGAGE.

INSURANCE.

1. *Fire Insurance—Mortgage—Cancellation of Policy—Double Insurance—Proofs of Loss.*—A policy of insurance covering the buildings on the mortgaged property and their contents, assigned by the mortgagor to mortgagees as collateral security, cannot be cancelled by the insurance company, at the request of the mortgagees, without notice to the mortgagor.

Insurance effected by mortgagees, without the mortgagor's assent, after an attempted cancellation, does not affect the mortgagor's right of recovery on the policy effected by him.

Where insurers repudiate liability on a policy they cannot object that proofs of loss have not been furnished.

Judgment of BOYD, C., 29 O. R. 377, affirmed. *Morrow v. The Lancashire Ins. Co.*, 173.

2. *Fire Insurance—Vendor and Purchaser—Partial Interest.*—A person who has only a partial interest in the subject matter may insure to the full insurable value of that subject matter, but in that event the policy must define in express terms

the nature of the interest insured, and if there is any ambiguity the insured will be entitled to recover only the value of his own interest.

Castellain v. Preston (1883), 11 Q. B. D. 380; 31 W. R. 558, specially referred to.

A policy issued to a vendor, who had received part of his purchase money, insuring the buildings on the land in question in a specified sum, with a proviso that the insurers are "to indemnify and make good unto the said assured, his heirs or assigns, all such direct loss or damage not exceeding in amount the sum or sums insured as above specified nor the interests of the assured in the property herein described," does not cover more than the vendor's interest or enable him to recover for the benefit of himself and the purchaser the full value of the subject matter.

Judgment of FERGUSON, J., 29 O. R. 394, reversed, MACLENNAN, J.A., dissenting. *Keefe v. Phoenix Ins. Co. of Hartford*, 277.

3. *Fire Insurance—Mutual Company—Assessment Note—Default—Forfeiture.*]—Default in payment of one of the deferred payments of the first instalment of a premium note given by an insurer in a mutual fire insurance company, under sec. 129 of the Act, R. S. O. ch. 203, does not *ipso facto* work a forfeiture.

A notice by the company to the insurer treating the payment as an assessment, and notifying him that in the event of nonpayment the policy would be suspended, is not an assessment under section 130, and nonpayment pursuant to the notice does not suspend the operation of the policy.

Judgment of MEREDITH, J., affirmed. *Woolley v. Victoria Mutual Fire Ins. Co.*, 321.

See BENEVOLENT SOCIETY—ESTOPPEL.

INTEREST.

See LIMITATION OF ACTIONS — MORTGAGE — MUNICIPAL CORPORATIONS, 4.

JOINT DEBTORS.

See BANKRUPTCY AND INSOLVENCY, 2.

JUDGMENT.

See BANKRUPTCY AND INSOLVENCY, 2.

JURISDICTION.

See ACTION.

JUSTICE OF THE PEACE.

See CONSTITUTIONAL LAW.

LANDLORD AND TENANT.

1. *Notice to Quit—"Disposing" of Premises—Covenant for Quiet Enjoyment.*]—A lease provided that in the event of the lessor "disposing" of the building the lessees should give up possession on certain notice; and soon after the lease was made notice was given by the lessor in assumed compliance with this proviso, and possession was given up by the lessees by consent but under protest before the expiration of the time limited by the notice. The alleged "disposal" of the building consisted in the making of an agreement by the lessor with

a person who was to have the superintendence of the building, to obtain tenants for the lessor, and to collect rents, with the right to take a sublease himself in certain events with an option to purchase:—

Held, per BURTON, C.J.O., and MOSS, J.A.—That this was not a disposal of the building within the meaning of the proviso, and that the lessor was liable in damages, he having misled the lessee to the latter's prejudice in reference to a fact within his own knowledge and in reference to which there was a legal obligation upon him to state the truth.

Per OSLER, J.A.—That (on the evidence) the plaintiffs were not deceived or misled by the notice and were not entitled to damages.

Per MACLENNAN, J.A.—That there was a disposal of the building within the meaning of the proviso, but that even if there was not, there was no right of action in the nature of an action of deceit, the notice having been given in good faith; and no right of action for breach of the covenant for quiet enjoyment, the notice, if bad, not affecting the lessee's rights.

In the result the judgment of ROSE, J., 29 O. R. 75, was affirmed. *Gold Medal Furniture Manufacturing Co. v. Lumbers*, 78.

2. *Lease—Assignment—Mortgage—Discharge.*—It having been held in a former action between the parties (27 S. C. R. 435) that the defendants were, under the assignment of lease by way of mortgage there in question, assignees of the term and liable on the covenants in the lease contained, it was now

Held, that they were entitled to execute a statutory discharge of the mortgage, and thus put an end to

their liability, the assignment to them having been made, with the lessor's consent, for a limited purpose.

Judgment of FALCONBRIDGE, J., reversed. *Jamieson v. The London and Canadian Loan and Agency Co. (No. 2)*, 116.

3. *Covenant for Renewal or Payment for Improvements—Election.*]

—Under a covenant in a lease that if, at the expiration of the term, the lessee should be desirous of taking a renewal lease, and should have given to the lessors thirty days' notice in writing of this desire, the lessors would renew or pay for improvements, the lessors have the right to elect and the lessee must accept a renewal unless before the expiration of the term the lessors elect not to renew. Judgment of MEREDITH, C. J., 29 O. R. 729, affirmed. *Ward v. City of Toronto*, 225.

LANDS INJURIOUSLY AFFECTED.

See MUNICIPAL CORPORATIONS, 4.

LEASE.

See LANDLORD AND TENANT.

LIBEL.

See DEFAMATION.

LIMITATION OF ACTIONS.

Mortgage—Arrears of Interest—Acknowledgment.]—Upon the sale of a property which was subject to mortgage, the purchaser and the mortgagor inquired from the mort-

gagee the amount due, and the mortgagee signed a memo., endorsed upon the mortgage, fixing the amount claimed by him. The deed to the purchaser was made subject to the mortgage, upon which there was stated to be due the amount claimed, and contained a covenant by the purchaser to pay the amount and to indemnify the mortgagor, but the deed was not executed by the purchaser :—

Held, that the statement of the amount in the deed was not an acknowledgment of which the mortgagee could take the benefit, and that as against an encumbrancer claiming under the purchaser the mortgagee was entitled to only six years' arrears of interest.

Judgment of *BOYD, C.*, reversed.
Colquhoun v. Murray, 204.

See MORTGAGE.

LOCAL IMPROVEMENTS.

See ASSESSMENT AND TAXES.

MALICE.

See MUNICIPAL ELECTIONS.

MANDAMUS.

See DRAINAGE, 4.

MASTER AND SERVANT.

1. *Hiring Waggon—Negligence of Driver—New Trial—Adding Parties.*—When a man is the general servant of one person and at the same time the servant of another person in relation to a particular

matter, the question which of these two persons is liable for his negligence must be decided by ascertaining which of them was exercising control over him at the time of the negligent act or omission, and if, in an action for damages against the alleged master, there is any evidence of exercise of control, the case must go to the jury.

In this case, where the defendants had hired from another company a horse and waggon and driver at a certain rate per day, it was held by the majority of the Court that there was some evidence from which exercise of control might be inferred.

Judgment of a Divisional Court affirmed, *BURTON, C. J. O.*, and *MACLENNAN, J. A.*, dissenting.

A Divisional Court, in ordering a new trial in an action for damages against the alleged master on the plaintiff's application, may properly add as a party defendant a person against whom relief is then for the first time claimed in the alternative.

Judgment of a Divisional Court affirmed. *Caston v. Consolidated Plate Glass Co.*, 63.

2. *Workmen's Compensation for Injuries Act—Defect in Plant—Damages—Infant—Mother's Services and Expenditure.*—The infant plaintiff, who was employed in a canning factory, was injured by the explosion of a retort or boiler in which vegetables were being cooked. The cooking was done by steam which was forced through the boiler, there being an intake pipe and an escape pipe which had to be adjusted by hand and no safety valve or automatic escape pipe. There was no evidence of the cause of the explosion, and the defendants contended that it was due to a latent defect in the boiler :—

Held, that it might properly be

inferred that the explosion was caused either by the negligence of the person whose duty it was to adjust the escape pipe, or by the absence of the safety valve, and that in either view the defendants were liable.

Judgment of ROSE, J., affirmed.

Held, also, that the mother of the infant could not recover for her services in attending upon him during his illness and for moneys expended and liabilities incurred by her for medical attendance, nursing and supplies, she not being in the legal relationship of master to him or under legal liability to maintain him.

Judgment of ROSE, J., reversed. *Wilson v. Boulter*, 184.

3. *Negligence—Independent Contractor.*]—The relationship of master and servant does not exist between a municipal corporation and a teamster hired by them by the hour to remove street sweepings with a horse and cart owned by him, the only control exercised over him being the designation of the places from which and to which the sweepings are to be taken, and the municipal corporation are not liable for an accident caused by his negligence while taking a load to the designated place.

Judgment of a Divisional Court, 29 O. R. 273, reversed, Moss J.A., dissenting. *Saunders v. City of Toronto*, 265.

MORTGAGE.

Sale—Account—Trust—Limitation of Actions—Interest—Instalment—Acceleration Clause.]—When a sale is effected under a mortgage made pursuant to the Manitoba Short

Forms of Mortgages Act, which, like the Ontario Short Forms of Mortgages Act, provides that the mortgagee shall be possessed of and interested in the moneys to arise from any sale upon trust to pay costs and charges and the principal and interest of the debt and upon further trust to pay the surplus, if any, to the mortgagor, the mortgagee becomes an express trustee of the proceeds of sale and the mortgagor is entitled to bring an action against him for an account notwithstanding the expiration of six years from the time of sale.

Section 32 of the Trustee Act, R. S. O. ch. 129, does not apply in such a case, because if there is a surplus it is trust money still retained by the trustee.

Judgment of FALCONBRIDGE, J., reversed.

A mortgage provided for payment of the whole principal money in two years from the date of the mortgage with interest in the meantime half-yearly at the rate of nine per cent. per annum; that on default of payment for two months of any portion of the money secured the whole of the instalments secured should become payable; and that on default of payment of any of the instalments secured at the times provided interest at the said rate should be paid on all sums so in arrear:—

Held, that the principal money was an instalment within the meaning of the proviso and that interest at the rate of nine per cent. per annum was chargeable upon it after the expiration of the two years. *Biggs v. Freehold Loan and Savings Company*, 232.

See INSURANCE, 1—LANDLORD AND TENANT, 2—LIMITATION OF ACTIONS.

MUNICIPAL CORPORATIONS.

1. *Damages—Non-repair of Highway—Notice of Accident—55 Vict. ch. 42, sec. 531, sub-sec. 1 (O.)—57 Vict. ch. 50, sec. 13 (O.)—59 Vict. ch. 51, sec. 20 (O.).*—The notice in writing of the accident and the cause thereof, referred to in the Consolidated Municipal Act, 1892, sec. 531, sub-sec. 1, as amended by 57 Vict. ch. 50, sec. 13 (O.), and 59 Vict. ch. 51, sec. 20 (O.), is not necessary when the accident is the result of non-repair of a highway which two or more municipalities are jointly liable to keep in repair.

Judgment of a Divisional Court, 29 O. R. 98, affirmed, MACLENNAN, J.A., dissenting. *Leizert v. Township of Matilda*, 1.

2. *Damages—Highway—Want of Repair—Negligence of Driver.*—A highway, in an old and thickly settled district, over which there is much traffic, is out of repair within the meaning of the statute when a large stump is allowed to stand in the highway just at the edge of the travelled way; MACLENNAN, J.A., dissenting.

Semble: Where horses are running away without any fault of the driver, and while he is still endeavouring to recover control of them he sustains injury owing to such a defect in the highway, he is entitled to damages.

The contributory negligence of the driver of the vehicle in such a case is not an answer to an action for injuries sustained by an occupant thereof, who has in good faith entrusted himself to the driver's care.

Judgment of a Divisional Court, 29 O. R. 139, reversed. *Foley v. Township of East Flamborough*, 43.

3. *Toronto Waterworks—Purity of Water—Injury to Hydraulic Elevator.*—The plaintiffs complained that an hydraulic elevator in a building owned by them had been damaged by sand in water supplied from the city works and claimed damages:—

Held, per BURTON, C.J.O., that as the plaintiffs might have stopped using the water at any time they could not hold the city responsible.

Per OSLER, and LISTER, J.J.A., that the city being bound by law to supply water from their system of waterworks to any inhabitant of the city who applies therefor, and complies with the statutory conditions, no contractual relationship arose between the city and the plaintiffs by reason of the application for water and the city's compliance therewith, and that the city were not liable, as upon a breach of contract to supply pure water, for injuries caused to the elevator.

Judgment of ROSE, J., 29 O. R. 459, affirmed. *Scottish Ontario and Manitoba Land Co. v. City of Toronto*, 345.

4. *Arbitration and Award—Lands Injurious Affected—Compensation—Damages—Interest.*—Compensation for lands injuriously affected in the exercise of municipal powers is in the nature of damages, and interest should not be allowed thereon before the time of the liquidation of the damages by the making of the award.

The distinction in this respect between such compensation and compensation for lands taken, or taken and injuriously affected, considered.

Judgment of a Divisional Court, 29 O. R. 685, reversed. *In re Leak and The City of Toronto*, 351.

5. *Highway—Obstruction—Negligence—Damages—Infant.*—A milkstand built on a highway by an adjoining proprietor and projecting slightly over the travelled way is such an obstruction to the highway as to constitute want of repair within the meaning of the Municipal Act, and where such an obstruction was shewn to have existed for three years and the municipal corporation having jurisdiction over the road in question had taken no steps to have it removed they were held liable in damages for an accident caused by it.

Castor v. Uxbridge (1876), 39 U. C. R. 113, considered and approved.

Quantum of damages for death of a child discussed.

Judgment of ROBERTSON, J., varied. *Huffman v. Township of Bayham*, 514; *Tanner v. Township of Bayham*, 514.

6. *Bell Telephone Company—Highway—Obstruction—Indemnity.*—Under its Acts of incorporation the Bell Telephone Company is authorized, with the consent of the municipal council interested, and under the supervision of the engineer of the municipality, or of such other officer as the municipal council may appoint, to erect and maintain poles along the sides of any street, but so as not to interfere with the public right of travelling on and using the street. Under an agreement with the municipal council of the defendants, the company erected a line of poles in one of the streets of the city, one pole being placed in the travelled portion of the street. The defendants had no engineer, and did not appoint any officer to supervise the erection of the poles, but there was some evidence that the work had been done under the supervision of an officer of the defendants

known as the "street surveyor," who discharged the duties usually discharged by an engineer of a municipality. The pole was allowed to remain in the street for several years, and the plaintiffs were injured by coming into collision with it, while lawfully using the street:—

Held, affirming the judgment of FERGUSON, J., 29 O. R. 518, that the pole was an illegal obstruction in the highway, which was therefore out of repair within the meaning of the Municipal Act, and that the defendants, having neglected to remove it, were liable in damages.

Held, also, reversing the judgment on this point, that the pole had not been erected under the supervision of the proper officer, and that the defendants were entitled to indemnity from the Bell Telephone Company.

Per MACLENNAN, J. A. The right to indemnity would exist even if the pole had been erected with the sanction of the defendants, and under the supervision of the proper officer. *Atkinson v. City of Chatham*, 521.

MUNICIPAL ELECTIONS.

Returning Officer—Refusal to Give Ballot Paper to Voter—"Wilful Act"—Absence of Malice or Negligence—Consolidated Municipal Act, 1892, sec. 168.—A returning officer at a municipal election refuses at his peril to give a ballot paper to a person on the voters' list claiming the right to vote, and willing, if required, to take the prescribed oath. The officer's refusal in such case is a wilful act within the meaning of section 168 of The Consolidated Municipal Act, 1892, and renders him liable to the voter for the statutory penalty

without proof of malice or negligence.

Johnson v. Allen (1895), 26 O. R. 550, not followed.

Judgment of a Divisional Court, 28 O. R. 419, affirmed, MACLENNAN, J.A., dissenting on the ground that on the evidence there was no refusal of the ballot paper. *Wilson v. Manes*, 398.

MUTUAL INSURANCE COMPANY.

See INSURANCE, 3.

NEGLIGENCE.

Street Railways—Damages—New Trial.—*Fraser v. London Street Railway Company*, 383.

See ACTION—MASTER AND SERVANT—MUNICIPAL CORPORATIONS—RAILWAYS—WAREHOUSEMAN.

NEWSPAPER.

See DEFAMATION.

NEW TRIAL.

See MASTER AND SERVANT, 1—NEGLIGENCE—WAREHOUSEMAN.

NOTICE OF CLAIM.

See DRAINAGE, 4 — MUNICIPAL CORPORATIONS, 1.

NOTICE TO QUIT.

See LANDLORD AND TENANT, 1.
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OUTLET.

See DRAINAGE, 2.

PARENT AND CHILD.

See CONTRACT, 4.

PARTIAL PERFORMANCE.

See CONTRACT, 3.

PARTIES.

See MASTER AND SERVANT, 1.

PASSENGER.

See RAILWAYS.

PAYMENT OF MONEY.

See BANKRUPTCY AND INSOLVENCY, 1.

PRACTICE.

See BANKRUPTCY AND INSOLVENCY, 2—CONSTITUTIONAL LAW—COURT OF APPEAL—REVENUE.

PROHIBITION.

See ASSESSMENT AND TAXES.

PROOFS OF LOSS.

See INSURANCE, 1.

PUBLIC HARBOUR.

See ICE.

PUBLIC SCHOOLS.

See SCHOOLS.

QUANTUM MERUIT

See CONTRACT, 3.

RAILWAYS.

Connecting Lines—Negligence—Passenger — Cattle Drover — Free Pass.—A contract was made by a railway company for the carriage of cattle to a point on the line of a connecting railway company at a fixed rate for the whole journey. The contract provided that the shipper (or his drover) should accompany the cattle; and that the person in charge should be entitled to a "free pass," but only "on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind on the part of the company or their servants":—

Held, that the condition was valid and could be taken advantage of by the connecting railway company, who therefore were not liable to the shipper for injuries suffered by him in a collision caused by their servants' negligence.

Hall v. North-Eastern R. W. Co. (1875), L. R. 10 Q. B. 437, applied.

Judgment of ROSE, J., reversed. *Bicknell v. Grand Trunk R. W. Co.*, 431.

REFUSAL TO GIVE BALLOT.

See MUNICIPAL ELECTIONS.

REGISTRATION.

See DRAINAGE, 5—EVIDENCE.

RELEASE.

See TRUST.

RES JUDICATA.

See ESTOPPEL.

RETURNING OFFICER.

See MUNICIPAL ELECTIONS.

REVENUE.

Succession Duty Act—Forum—55 Vict. ch. 6 (O.)—R. S. O. ch. 24—Practice—Special Case—Declaration of Right.—When the provincial treasurer and the parties interested do not agree as to the succession duty payable the question must be settled by the tribunal appointed by the Act, namely, the Surrogate Registrar, with the right of appeal given by the Act. The High Court has no jurisdiction to decide the question in a stated case.

The Court of Appeal refused, therefore, to entertain an appeal from the judgments of ROSE, J., 27 O. R. 380, and 28 O. R. 571.

Questions of law which cannot properly arise in, or as incidental to an action, or other proceeding in Court, cannot be made the subject of a special case under Rule 372 in order to obtain the opinion of the Court thereon.

Where a special forum is created by statute for determining rights of parties, a declaration of right will not be made by the Court under sec. 57, sub-sec. (5), of the Judicature Act, in an action which the Court has no jurisdiction to entertain. *Attorney-General v. Cameron*, 103.

RIGHT OF WAY.*See* EASEMENT.**SALE OF GOODS.**

Bills of Sale Act—Subsequent Purchaser.—A purchaser of goods who neglects to comply with section 6 of the Bills of Sale Act cannot invoke its provisions as against a subsequent purchaser in good faith, and the latter, even though he also has not complied with the Act, obtains priority.

Judgment of ROSE, J., affirmed.
Winn v. Snider, 384.

See FIXTURES—MORTGAGE.**SAW LOGS DRIVING ACT.***See* WATER AND WATERCOURSES, 1.**SCHOOLS.**

1. *Public Schools—Union School Section—Existence De Facto—Alteration of Boundaries—"Municipality Concerned"*—*R. S. O. ch. 292, secs. 42, 43.*—There was no proof of the formation of the union school section in question, but it was shewn that for many years a lot in one township had been marked in the assessment roll as in a school section of the adjacent township, to which the taxes received in respect of that lot were paid; that in various reports and returns made by the school inspector the owner of the lot was treated as a ratepayer in respect of the school section of the adjacent township; that his children went to the school established there; and

that in the township school map, prepared by the township clerk under the provisions of sub-sec. 4 of sec. 11 of the Public Schools Act, *R. S. O. ch. 292*, the lot was marked as in the school section of the adjacent township:—

Held, that the evidence was sufficient to shew that the union school section existed in fact and that section 42 of the Act applied to it, so that it must be deemed to have been legally formed.

History and object of that legislation discussed.

Proper corporate description of the trustees of a union school section pointed out.

A municipality in which there is any territory forming part of the union school section in question is "concerned," within the meaning of section 43 of the Act, in any proceedings for the alteration of the section, and these proceedings must be based upon a petition of five ratepayers of this municipality, though not necessarily of ratepayers in the territory itself.

Judgment of STREET, J., affirmed.
Nichol School Trustees v. Maitland, 506.

2. *Public Schools—R. S. O. ch. 292, secs. 38, 39—Alteration of School Sections.*—*In re Powers and Township of Chatham*, 483.

SERVICE OF WRIT.*See* ACTION.**SEVERANCE.***See* FIXTURES.

SHIP.

General Average—Ice.—A liability to general average contribution arises only where both ship and cargo are in imminent and un contemplated peril and there is expenditure or sacrifice to secure their safety.

There is, therefore, no liability on the part of the cargo of a ship to general average contribution when, at a season of the year when such an occurrence is to be expected, ice forms in a harbour where a ship is lying in safety, and a tug is employed for the purpose of releasing her to enable her to complete her voyage.

Judgment of *Boyd, C.*, reversed. *Kidd v. Thomson*, 220.

SOLICITOR.

Agreement for Compensation—Champertry—Exchequer Court—Taxation.—An agreement by a solicitor to prosecute a claim to judgment at his own expense in consideration of his receiving one-fourth of the amount which should be recovered is champertous and void.

Per Moss, and LISTER, JJ.A. A solicitor of the Supreme Court of Judicature for Ontario who as such does business in carrying on proceedings for a client in the Exchequer Court of Canada is subject to the provisions of the Solicitors' Act with regard to delivery and taxation of his bill of fees, charges or disbursements in respect of such business.

Judgment of a Divisional Court, 29 O. R. 47, reversed in part, *OSLER, J.A.*, dissenting as to the result. *O'Connor v. Gemmill*, 27.

SPECIFIC PERFORMANCE.

See *CONTRACT*, 4.

STATED CASE.

See *CONSTITUTIONAL LAW—REVENUE.*

STATUTES.

R. S. O. (1887) ch. 121.]—See *WATER AND WATERCOURSES*, 1.

R. S. O. (1887) ch. 193, sec. 135.]—See *ASSESSMENT AND TAXES.*

55 Vict. ch. 6 (O.).]—See *REVENUE.*

55 Vict. ch. 42, sec. 168 (O.).]—See *MUNICIPAL ELECTIONS.*

55 Vict. ch. 42, sec. 531, sub-sec. 1 (O.).]—See *MUNICIPAL CORPORATIONS*, 1.

57 Vict. ch. 50, sec. 13 (O.).]—See *MUNICIPAL CORPORATIONS*, 1.

57 Vict. ch. 56, sec. 75 (O.).]—See *DRAINAGE*, 2.

59 Vict. ch. 51, sec. 20 (O.).]—See *MUNICIPAL CORPORATIONS*, 1.

R. S. O. ch. 24.]—See *REVENUE.*

R. S. O. ch. 91, sec. 3.]—See *COURT OF APPEAL*, 1.

R. S. O. ch. 91, sec. 5.]—See *CONSTITUTIONAL LAW.*

R. S. O. ch. 129, sec. 32.]—See *MORTGAGE.*

R. S. O. ch. 136, sec. 63.]—See *EVIDENCE.*

R. S. O. ch. 226, sec. 3, sub-sec. 2.]—See *DRAINAGE*, 5.

R. S. O. ch. 226, sec. 73.]—See *DRAINAGE*, 4.

R. S. O. ch. 226, sec. 83.]—See *DRAINAGE*, 5.

R. S. O. ch. 226, sec. 89, sub-sec. 3.]—See *DRAINAGE*, 3.

R. S. O. ch. 292, secs. 38, 39.]—See *SCHOOLS*, 2.

R. S. O. ch. 292, secs. 42, 43.]—See *SCHOOLS*, 1.

STREET RAILWAYS.*See* NEGLIGENCE.**SUCCESSION DUTY ACT.***See* REVENUE.**SUSPENSE ACCOUNT.***See* COLLATERAL SECURITY.**TAXATION.***See* SOLICITOR.**TIMBER.***See* WATER AND WATERCOURSES, 1.**TORONTO WATERWORKS.***See* MUNICIPAL CORPORATIONS, 3.**TRUST.**

Grant on Condition—Release.]—The owner of land, “in consideration of natural love and affection and of one dollar,” conveyed it to the defendants in fee, subject to a life estate in his own favour, and “subject to the payment thereof by the (defendants)” of certain sums to the plaintiffs, the deed being voluntary as to them. The deed contained a covenant by the defendants with the grantor to make the payments and was executed by the grantor and the defendants. Seven months later the grantor conveyed the same land to the defendants in

fee, for their own use absolutely, free from all encumbrances, but subject to his life estate :—

Held, that an irrevocable trust was created by the first deed in favour of the plaintiffs and was enforceable by them, and that this trust was not affected or released by the second deed.

Gregory v. Williams (1817), 3 Mer. 582, and *Mulholland v. Merriam* (1872), 19 Gr. 288, applied.

Judgment of *Rose, J.*, reversed. *Edmison v. Couch*, 537.

See MORTGAGE.**UNION SCHOOL SECTION.***See* SCHOOLS.**VENDOR AND PURCHASER.***See* INSURANCE, 2.**WAREHOUSEMAN.**

Negligence—Damages—New Trial.]—In an action against the owners of a grain elevator to recover damages for alleged negligence in the care of grain one of the grounds of negligence found by the jury was that the grain had been taken into the elevator from the vessel while rain was falling and that the vessel's hatches had not been protected :—

Held, that the responsibility of the defendants did not commence till the grain was delivered to them ; that therefore there was no duty cast upon them to protect the grain during the process of unloading ; and a general assessment of damages having been made upon this and

other grounds of negligence, a new trial was ordered.

Judgment of FALCONBRIDGE, J., reversed. *Dunn v. Prescott Elevator Co.*, 389.

WATER AND WATERCOURSES.

1. *Timber — Saw Logs Driving Act—R. S. O. (1887) ch. 121—Arbitration and Award.*]—When a person floating logs down a stream fails to break jams of such logs, as directed by section 3 of The Saw Logs Driving Act, another person whose logs are obstructed by the jam has no right of action for damages, but is limited to the remedy given by the Act, namely, the breaking of the jam at the expense of the person whose logs have formed it.

When an arbitrator awards one sum in respect of matters, some of which are within, and some without his jurisdiction, the award must be set aside.

Judgment of ROSE, J., reversed. *Cockburn v. Imperial Lumber Co.*, 19.

2. *Drainage — Cultivation of Land.*]—While the owner of land has an undoubted right to drain it in the ordinary course of husbandry, he must take care that any water collected by his drains is carried to a sufficient outlet, and if the water is drained into a pond which is not large enough to hold the additional volume of water thus brought into

it, he is liable in damages to a person whose land is flooded by water overflowing from such pond.

Judgment of the Drainage Referee reversed. *Young v. Tucker*, 162.

See DRAINAGE—ICE—MUNICIPAL CORPORATIONS, 3.

WAY.

See EASEMENT—HIGHWAY.

WILL.

See BENEVOLENT SOCIETY.

WORDS.

“Concerned.”]—See SCHOOLS.

“Disposing” of Premises.]—See LANDLORD AND TENANT, 1.

“Harbour.”]—See ICE.

“Instalment.”]—See MORTGAGE.

“Municipality Concerned.”]—See SCHOOLS.

“Wilful Act.”]—See MUNICIPAL ELECTIONS.

WORKMEN'S COMPENSATION FOR INJURIES ACT.

See MASTER AND SERVANT.

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